Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DALE E. REICH,

Petitioner,

v.

MICHAEL SPELLMAN, ASSISTANT CHANCELLOR, UNIVERSITY RELATIONS, UNIVERSITY OF WISCONSIN-WHITEWATER, JAMES R. CONNOR, FORMER CHANCELLOR, UNIVERSITY OF WISCONSIN-WHITEWATER, and BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Respondents.

Petition For A Writ of *Certiorari*
To The Court of Appeals
For The State of Wisconsin, District II

PETITION FOR WRIT OF *CERTIORARI*

For The Petitioner:

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179pp

QUESTIONS PRESENTED

I. Regarding the petitioner's first amendment 42 U.S.C. § 1983 "whistle blower" claim and the respondents' claim of qualified immunity:

A. Whether the petitioner's interest in protected speech involving (1) a state university's policy of conditioning business contracts on "contributions," and (2) a university administrator's order to a subordinate to intentionally lie if questioned about the policy, outweighed the respondents' "confidentiality interest";

B. Whether it was clearly established in 1991 that state university administrators could not retaliate against a subordinate who refused to obey a superior's order to lie to an interested member of the general public about the university's policy, possibly in violation of state bidding regulations and state and federal law, of punishing local businesses which did not make financial contributions to a university fund-raising campaign by denying them university business; and

C. What constitutes a genuine dispute as to material fact such that summary judgment is precluded, and what is the proper method and degree of analysis that should be applied in determining whether a dispute is material?

II. Regarding Wisconsin's statutory notice-of-claim requirements:

A. Whether, if the Wisconsin Court of Appeals is correct in holding that the petitioner did not comply with the statutory notice requirements, those requirements as applied resulted in an unconstitutional deprivation of the petitioner's right to due process as guaranteed by the 14th Amendment; and

B. Whether, in light of the intervening case of DNR v. City of Waukesha, 184 Wis. 2d. 178, 198, 515 N.W.2d 888 (1994), the equal protection and due process clauses of the 14th Amendment to the United States Constitution require that substantial rather than strict compliance be required?

LIST OF PARTIES

Petitioner Dale E. Reich was the plaintiff/appellant in the proceeding below. Respondents Michael Spellman, James R. Connor, and Board of Regents of the University of Wisconsin System were defendants/respondents in the proceeding below.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

LIST OF APPENDICES v

TABLE OF AUTHORITIES vii

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF WISCONSIN, DISTRICT II 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

I. THE COURT OF APPEALS ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY. 10

TABLE OF CONTENTS (CONTINUED)

A. THE PETITIONER'S INTEREST IN PROTECTED SPEECH INVOLVING (1) A STATE UNIVERSITY'S POLICY OF CONDITIONING BUSINESS CONTRACTS ON "CONTRIBUTIONS," AND (2) A UNIVERSITY ADMINISTRATOR'S ORDER TO A SUBORDINATE TO INTENTIONALLY LIE IF QUESTIONED ABOUT THE POLICY, OUTWEIGHED THE RESPONDENTS' "CONFIDENTIALITY INTEREST". 10

B. IT WAS CLEARLY ESTABLISHED IN 1991 THAT A GOVERNMENT EMPLOYER COULD NOT RETALIATE AGAINST AN EMPLOYEE WHO REFUSES TO OBEY THE EMPLOYER'S ORDER TO LIE ABOUT AN ETHICALLY AND LEGALLY QUESTIONABLE POLICY. 17

C. BOTH LOWER COURTS ERRED IN FAILING TO ISOLATE AND ANALYZE NUMEROUS DISPUTED FACTS AS TO THEIR MATERIALITY. 19

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PETITIONER'S STATE CLAIM. 22

A. WIS. STATS. § 893.82 AS APPLIED DEPRIVED THE PETITIONER OF HIS RIGHT TO DUE PROCESS. 22

TABLE OF CONTENTS (CONTINUED)

B. EVEN IF THE "TRIGGERING DATE" FOR NOTICE OF CLAIM WAS JANUARY 31, 1991, IN LIGHT OF THE INTERVENING CASE OF DNR V. CITY OF WAUKESHA, EQUAL PROTECTION AND DUE PROCESS REQUIRE THAT SUBSTANTIAL RATHER THAN STRICT COMPLIANCE BE REQUIRED TO COMPLY WITH NOTICE REQUIREMENTS. 24

CONCLUSION 30

LIST OF APPENDICES

DOCUMENT(S) — APPENDIX PAGE

Court of Appeals Decision Dated and Released June 1, 1994 . . . . . A-1

Supreme Court of the State of Wisconsin's Denial of Petition For Review B-1

Memorandum Decision On Defendant State'[s] Motion For Summary Judgment, Circuit Court, Walworth County, Hon. John R. Race, Dated April 28, 1993 . . . . . C-1

Affidavit of Dale E. Reich, Dated October 29, 1992 . . . . . D-1

APPENDICES (CONTINUED)

Second Affidavit of Dale E. Reich
(With Selected Attached Exhibits A - I)
Dated December 21, 1992 . . . . . E-1

United States Constitutional
Provisions Involved F-1

42 U.S.C. § 1983 . . . . . G-1

Wisconsin Statutes Involved H-1

News Coverage and (Inaccurate)
University Memorandum and Press
Release Following Decision by the
Court of Appeals I-1

[Excerpt From Companion Jefferson
County] Memorandum Decision [On
Petitioner's Appeal of An Adverse
Unemployment Compensation Ruling] J-1

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

Anderson v. Creighton,
483 U.S. 635 (1987) . . . . . passim

Bazemore v. Friday,
478 U.S. 385 (1986) 22, 23, 24

Connick v. Myers, 461 U.S. 138 (1983) 14

Delaware State College v. Ricks,
449 U.S. 250 (1980) 22, 23, 24

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 20

Loving v. Virginia,
388 U.S. 1 (1967) 26

Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 20

Rankin v. McPherson,
483 U.S. 378 (1987) 14

Siegert v. Gilley,
500 U.S. 226 (1991) 16

Wood v. Strickland,
420 U.S. 308 (1975) 19

TABLE OF AUTHORITIES (CONTINUED)

OTHER FEDERAL CASES:

Auriemma v. Rice,
910 F.2d 1449 (7th Cir. 1990) 17

Beavers v. American Cast Iron Pipe Co.,
975 F.2d 792 (11th Cir.1992) 22

Beiluch v. Sullivan,
999 F.2d 666 (2nd Cir. 1993) 15

Broderick v. Roache,
996 Fed.2d at 1299 20

Conner v. Reinhard,
847 F.2d 384 (7th Cir.),
cert. denied, 477 U.S. 856 (1988) 14

Czurlanis v. Albanese,
721 F.2d 98 (3d Cir. 1983) 13

Dunn v. Carrol,
40 F.3d 287 (8th Cir. 1994) 15

Elliott v. Thomas,
937 F.2d 338 (7th Cir. 1991) 16

Feliciano-Angulo v. Rivera-Cruz,
858 Fed.2d 40 (1st Cir. 1988) 20

Green v. Carlson,
826 F.2d 647 (7th Cir. 1987) 21

TABLE OF AUTHORITIES (CONTINUED)

Hall v. Ryan,
957 Fed. 2d 402 (7th Cir. 1992) 18

Hanson v. Bennett,
948 Fed.2d 397 (7th Cir. 1991) 20

Hicks v. City of Watonga,
942 F.2d 737 (10th Cir.1991) 15

Jeffries v. Turkey Run Consolidated School Dist.,
492 F.2d 1 (7th Cir. 1974) 26

Jones v. Peruit & Mauldin,
808 Fed. 2d 1435 (11th Cir.) vac'd in part
on other grounds on her'g, 822 F.2d 998
(11th Cir.), reh'g en bank granted,
833 F.2d 1436 (11th Cir. 1987) 19

Lewis v. City of Ft. Collins,
903 F.2d 752 (10th Cir.1990). 15

Lowell v. Glidden-Durkee, Div. of SCM Corp.,
529 F.Supp. 17 (1991) 22

Martinez v. City of Opa-Lock, Fla.,
971 F.2d 708 (11th Cir.1992) 13

Nereida-Gonzalez v. Tirado-Delgado,
990 Fed. 2d 701 (1st Cir. 1993) 21

Pasquino v. Prather,
13 F.3d 1049 (7th Cir. 1994) 21

TABLE OF AUTHORITIES (CONTINUED)

Rodriguez-Pinto v. Tirado-Delgado,
982 Fed. 2d 34 (1st Cir. 1993) 21

Rookard v. Health and Hospitals Corp.,
710 F.2d 41 (2d Cir. 1983) 13

Schiller v. Moore,
30 F.3d 1281 (10th Cir. 1994) 15

Soltani v. Smith,
812 F.Supp. 1280 (D.N.H. 1993) 18

Thompkins v. Vickers,
26 F.3d 603 (5th Cir. (1994) 16

Walter v. Morton,
33 F.3d 1240 (10th Cir. 1994) 15

Webb v. Indiana Nat. Bank,
931 F.2d 434 (7th Cir.1991) 22

STATE CASES:

Barnhill v. Board of Regents,
166 Wis. 2d 395, 479 N.W.2d 917 (1991) . . . passim

Broome v. Truluck,
270 S.C. 227, 241 S.E.2d 739 (1978) 27

Burkes v. Klauser,
185 Wis. 2d 309, ___ N.W. ___ (1994). . . . . passim

TABLE OF AUTHORITIES (CONTINUED)

Carson v. Maurer,
424 A.2d 825 (1980) 27

Daily v. Wis. University, Whitewater,
145 Wis. 2d 756, 429 N.W.2d 83 (1988) 24

DNR v. City of Waukesha,
184 Wis. 2d. 178, 515 N.W.2d 888 (1994) . . passim

Figgs v. City of Milwaukee,
121 Wis. 2d 44, 357 N.W.2d 548 (1984) 26

Fujioka v. Kam,
55 Hawaii 7, 514 P.2d 568 (1973) 27

Grams v. Boss,
97 Wis.2d 332, 294 N.W.2d 473 (1980) 21

Henderson Clay Products v. Edgar Wood, Etc.,
451 A.2d 174 (N.H. 1982) 27

Kallas Millwork Corp. v. Square D. Co.,
66 Wis.2d 382, 225 N.W.2d 454 (1975) 27

Loyal Order of Moose, Lodge 1785 v. Cavaness,
563 P.2d 143 (Okla. 1977) 27

Reich v. State Highway Department,
386 Mich. 617, 194 N.W.2d 700, (1972) 27

Renner by Brennan v. Madison General Hosp.,
151 Wis. 2d 855, 447 N.W. 2d 97 (App.1989)
review denied 451 N.W. 2d 297 26

TABLE OF AUTHORITIES (CONTINUED)

Skinner v. Anderson,
38 Ill.2d 455, 231 N.E.2d, 588 (1967) 27

FEDERAL AND STATE STATUTES:

42 U.S.C. § 1983 . . . . . i, 2, 7

Wis. Stats. § 230.80 17

Wis. Stat. § 893.80 . . . . . passim

Wis. Stat. § 893.82 . . . . . passim

Wis. Stats. § 895.65 17

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF WISCONSIN, DISTRICT II

Petitioner, Dale E. Reich, respectfully prays that a writ of certiorari issue to review the judgment and opinion of Court of Appeals for the State of Wisconsin, District II, affirming the Walworth County Circuit Court's grant of summary judgment to the defendants on the basis of qualified immunity and the petitioner's alleged failure to comply with statutory notice-of-injury requirements.

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals for the State of Wisconsin, District II, appears in the appendix to this petition at pages A-1 - A-18. The decision affirmed an unpublished written judgment of the Circuit Court for Walworth County which appears in the appendix at pages C-1 to C-27.

JURISDICTION

The April 28, 1993 Memorandum Decision of the Walworth County Circuit Court granting the respondents' Motion for Summary Judgment, was timely appealed by the petitioner to the Court of Appeals for the State of Wisconsin, District II, which had jurisdiction pursuant to Wisconsin Statutes § 808.03. The Court of Appeals decision affirming the circuit court was filed on June 1, 1994. A timely Petition for Review of the Court of Appeals decision was filed in the Supreme Court of the State of Wisconsin on July 1, 1994, by the petitioner. The Wisconsin Supreme Court's denial of the Petition for Review was issued on November 16, 1994. See B-1, *infra*. The United States Supreme Court's jurisdiction is invoked under title 28 U.S.C. § 2104 and 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution are reprinted in the Appendix hereto at page F-1, *infra*. 42 U.S.C. § 1983 is reprinted in the Appendix hereto at page G-1, infra. Wisconsin Statutes §§ 893.80, 893.82 and 895.65 are reprinted in the Appendix hereto at page H-1, *infra*.

STATEMENT OF THE CASE

Petitioner, Dale E. Reich, seeks damages under state statute and federal common law and civil rights statutes for actions taken by the respondents, including a job transfer and demotion, in retaliation for his exercise of protected speech. Reich became Director of News and Publications at the University of Wisconsin at Whitewater (hereafter "University") in July, 1978. Reich served in this position for approximately 11 years. During his tenure, Reich consistently received favorable appraisals from his superiors, was honored with numerous awards and citations, regularly had his appointment renewed, and received numerous and generous pay raises. R-23:3-4; D-3 to D-5[1]. A review of Reich's personnel file indicates that at no time during these 11 years did he ever receive negative written feedback regarding his job performance from either the then-Chancellor, respondent Connor, or from his immediate supervisor, then-Assistant Chancellor Kay Woit. Id.

Reich functioned relatively autonomously and with a small staff under Ms. Woit. R-23:2; D-2. In 1988 or 1989, when Ms.

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[1]References to the "Record" as prepared by the circuit court clerk and submitted to the Court of Appeals are presented as "R-(specific record cite)." References to appendices A through J attached to this petition begin with the corresponding letter followed by the page number: e.g., "A-1" or "D-10".

Woit resigned. the petitioner, upon the request of respondent Connor, assumed the position of Acting Assistant Chancellor of University Relations. This appointment, along with the aforementioned favorable appraisals and pay increases, reflected the satisfaction of then-Assistant Chancellor Woit and respondent Connor with Reich's long-term job performance. Reich initially expressed an interest in a permanent appointment as Assistant Chancellor, but changed his mind since the job involved "almost exclusively. . . fund-raising." Id. Respondent Spellman was eventually hired.

During 1990 and 1991, Spellman and his staff were engaged in a fund-raising campaign to fund a multi-purpose university auditorium. During the course of these efforts, respondent Spellman informed the Reich that The Whitewater Register (hereafter, "The Register"), a publication enterprise in the City of Whitewater, and other local businesses including the Nelson Bus Company (R-21;335), would be penalized with the loss of University business because they did not make what respondent Spellman considered to be an adequate contribution to the auditorium fund-raising campaign. R-41:1-2; E-1 to E-2. Spellman told Reich that the purpose of the new policy of conditioning University contracts with local business on contributions was to "teach these people [businesses] downtown a lesson." R-21:348.

Wanting to avoid embarrassment however, Spellman directed that the "lesson" not be expressly communicated to the intended recipients. Spellman told Reich that, if asked by anyone from The Register, Reich was to lie by claiming that the loss of business was based solely on poor quality of work. R-41:1-2; E-1 to E-2.

Pursuant to Spellman's policy, The Register was subsequently denied the opportunity to bid to renew a printing contract they had with the University. Despite personal misgivings about the propriety of Spellman's policy, Reich

initially attempted to abide by it. R-23:7; D-8. When contacted by phone by Tom Coe of The Register who asked why he was not allowed to bid, Reich initially replied as directed by respondent Spellman, claiming the decision was based solely on poor quality. R-23:7; D-8; R-41:1-5; E-1 - E-2. Uncomfortable with this fabrication, Reich immediately called Coe back and admitted that he had not been truthful and that the real reason for The Register's loss of business was that Coe had not sufficiently contributed to the auditorium project. R-41:2; E-2.

Although Reich, as Director of News and Publications, had numerous contacts in the news media, he did not "go public" with, leak, or broadcast potentially embarrassing information about the legally and ethically questionable University policy. Rather, in a limited manner, he disclosed the policy to a clearly interested member of the general public who initiated the inquiry and who had a right to an honest answer from a public employee.

Still, Reich's superiors were infuriated by the disclosure and a progressive series of retaliatory actions against Reich ensued, beginning with a reprimand by both respondents Spellman and Connor. R-41:3; E-2 - E-3. During a meeting to discuss the disclosure, Connor advised Reich that regardless of his feelings about the propriety of Spellman's actions, Reich would be required to obey the Spellman's directions. R-23:4-5; D-6 - D-6. Respondent Connor admonished Reich, stating "it is not up to you to take Mike's [Respondent Spellman's] dirty laundry downtown." R-21:338. Immediately following the meeting, Spellman threatened Reich with unnamed impending action, which turned out to be the involuntary physical relocation to another "office" (a converted storage space) and accompanying isolation and ostracism. R-23:5-6; D-6 - D-7.

Following the verbal reprimand, Reich decided that, under the circumstances, he could no longer continue to work under Spellman's supervision and he attempted to resign. Id. He was persuaded however by then-Chancellor Connor to allow the

Chancellor to secure alternative comparable employment for him within the University. But instead of obtaining such a job for Reich, Connor wrote to Reich on January 31, 1991 stating (a) that Reich's resignation was now being accepted, effective June 30, 1991, but (b) that Connor would continue to attempt to find Reich another job with the University. R-41:Ex.A; E-10 - E-12. Thus, the equivocal threat of termination was coupled with an offer to find Reich another job.

A series of negotiations and communications involving Reich, his attorney, the respondents, and their counsel ("general counsel" for the University of Wisconsin System, Charles Stathas) took place during the winter and spring of 1991 (see Argument II(B), *infra*). Then, on June 18, 1991, Respondent Connor wrote to Reich, informing him that he "will be assigned" to another department and that his annual salary "will be" an amount approximately $15,000 less than it had been. R-41:7 and Ex.H; E-6 and E-30 - E-32. (emphasis added). Connor also told Reich that he should "plan to report [to his new job] on July 1, 1991." Id. The involuntary, coercive nature of the transfer was confirmed during Reich's subsequent telephone with then newly-appointed Chancellor Gaylon Greenhill who indicated that Reich could either accept his reassignment or be fired. R-41:7-8; E-6.[2]

The retaliatory actions against Reich thus culminated in June of 1991 with his involuntary and arbitrary transfer and demotion to another job that required substantially different training and responsibilities than he had in his old job and

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[2]The respondents characterize the contents of Connor's letter as "a gratuitous [job] offer", a claim contradicted by the record. The "offer" clearly does not, for example, allow for voluntary acceptance or rejection by petitioner. Rather, Connor's letter compelled "acceptance" by directing that Reich "will be assigned" and when to "plan to report". Finally, while it is clear from the record that Reich was not interested in the position "offered" (R-23: 5; D-5 - D-6) and refused to sign the contract (E-33 - E-34) provided by Connor (R-41:7; E-6), Greenhill nevertheless confirmed the transfer (R-41:7-8 and Ex.I; E-6 and E-35).

resulted in a substantial drop in pay. This "fresh wrong" caused Reich to experience humiliation and intense emotional and financial strain which necessitated psychological treatment. R-23:5-7; D-5 to D-7.

Reich complied with statutory notice requirements when he filed his Notice of Claim on September 30, 1991, exactly 90 days after the event causing the injury, namely the June 30 transfer, demotion, and reduction in pay. A-15. Further notice of claim was provided prior to the petitioner's last day of work. See Argument II(B), *infra*.

At the time the appellant disclosed information to The Register, he reasonably believed that respondent Spellman's policy violated state laws or bidding procedures, constituted an abuse of his authority, and may have resulted in a substantial waste of public funds. R-41:3-4; E-2 to E-4. The appellant viewed respondent Spellman's actions as a "strong arm tactic" and "morally wrong". R-21:532. Reich also believed the actions to be in violation of fund-raising ethical standards. R-41:3-4; E-2 to E-4. (The respondents do not contend anywhere in their voluminous court filings that respondent Spellman acted ethically; rather, the thrust of their strategy has been to attack the petitioner's motives or the reasonableness of his actions.)

Extensive media coverage of this case has confirmed both the public's interest and Reich's belief that he was being retaliated against for disclosing information that he "reasonably believe[d]" demonstrated a violation of state regulations or law and represented an "abuse of authority in state government."[3] In

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[3]Wis. Stats. § 895.65(1)(d). See, also, the Circuit Court Memorandum Decision in the companion unemployment case, J-1 - J-2 (suggesting that bidding requirements should have been abided by). The alumni paper printed by the Register is funded with money funnelled through the University's fund-raising arm, the "University of Wisconsin - Whitewater Foundation" (hereafter, "Foundation"). Documents submitted in circuit court establish that the relationship

addition to changing the criteria for selecting subcontractors by adding the requirement that they be contributors to the University, respondent Spellman's directive also changed the University policy and practice of adhering to state bidding procedures as it had in the past.

The petitioner's 42 U.S.C. § 1983 and state statutory claims were timely and properly raised in the circuit court for Walworth County, Wisconsin. With regard to the civil rights claim, the circuit court, granted the respondent's motion for summary judgment on the following basis: "(1) The plaintiff has established no clear right; and (2) considering the employer's needs, the ambiguous nature of the employer's acts, the need for confidentiality when dealing with the supplier, the need for loyalty and confidence". R-43:10; C-16. With regard to the 120-day notice issue associated with the petitioner's state claim, the court granted the respondent's motion for summary judgment on the basis that "[w]hile plaintiff argues he was negotiating in discussing this matter with University officials, it is [the court's]

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between the University and Foundation is such that the petitioner's belief that state bidding rules, which had been adhered to in the past, should have been followed was reasonable (and probably correct). R-40:23-29. The Foundation is both directly and indirectly subsidized by the taxpayers of Wisconsin: it is provided on-campus facilities and a "sweetheart lease" (R-41:Ex.O); and Foundation "staff" are paid from the University's payroll (the Foundation's Executive Director [respondent/"Assistant Chancellor" Spellman], for example, who spends the majority of his working day engaged in fund-raising activities (R-38:2-5), is paid primarily by the University (he receives a gratuity of $5,000.00 per year from the Foundation, while the University pays him $67,876.00). R-41:Ex.N. Other University personnel are engaged in a wide range of Foundation activities including records maintenance (R-41:Ex.P); production of publications; planning and conducting fundraising campaigns and events; and procurement of subcontracts. With the exception of the nominal fee paid to respondent Spellman, none of the state employees who do Foundation work are compensated by the Foundation. R-41:Ex.N. and Ex.P. Rather, they are paid out of public revenues. In sum, the Foundation and the public University enjoy a symbiotic relationship that results in an inextricable intertwining of their funds, personnel, policies, and practices.

opinion that the triggering date is January 31, 1991; and, therefore, no timely notice was given". R-43:15, C-27.

In affirming the circuit court on the issue of qualified immunity, the Wisconsin Court of Appeals held that "the defendants are entitled to qualified immunity because the law in 1991 was not clearly established that Reich's [protected speech] interests outweighed those of the defendants". A-12.[4] A Petition for Review of the Court of Appeals decision was filed by the petitioner in the Supreme Court of the State of Wisconsin on July 1, 1994 and denied on November 16, 1994.

With regard to the 120 day notice issue, the court of appeals concluded that the plaintiff "reasonably should have known that the defendants may have been retaliating against him for his exercise of free speech when he received the January 31, 1991 letter of termination." The petitioner's due process and "substantial compliance" arguments relating to § 893.82 were raised in the trial court and Wisconsin Court of Appeals, but both courts declined to directly address them.[5] These same arguments

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[4]Subsequent to the court of appeals decision in the instant case, the Wisconsin Supreme Court, in Burkes v. Klauser, summarized the "*relevant* inquiry" in assessing a qualified claim: "whether a reasonable state official could have believed his or her act was constitutional 'in light of clearly established law and information [he or she] possessed at the time of the official's action.'" 185 Wis. 2d 309, 327, ___ N.W. ___ (1994) (emphasis added) (citing Anderson v. Creighton, 483 U.S. 635, 641 (1987). The author of the Burkes decision, Justice Shirley S. Abrahamson, did not participate in the Wisconsin Supreme Court's review of the Petition for Review in this case, or in another decision involving the University of Wisconsin, Barnhill v. Board of Regents, 166 Wis. 2d 395, 420, 422, 479 N.W.2d 917 (1991), discussed *infra* at 15.

[5]Although the petitioner did not frame his notice of claim arguments using the "due process" parlance, the issue raised by the petitioner in the circuit court and again in the court of appeals is one of due process; it is a firmly established principal that, notice of claim statutes require "only substantial, and not strict, compliance" so as "to preserve bona fide claims." See Argument II(B), *infra*.

have been supplemented, based upon an intervening Wisconsin Supreme Court decision, in Reich's Petition For Review to the state Supreme Court and again in this petition.[6]

Even though the petitioner suffered in June and July, 1991, injuries different in kind and degree than the one threatened in January of that year, the Court of Appeals nevertheless held that notice of the June transfer and demotion was provided by the January threatened firing. Without comment or analysis, the Court of Appeals thus declined to address the petitioner's "fresh wrong" argument. See Argument II(A), *infra*.

The Petition for Review of the Court of Appeals decision was timely filed by the petitioner in the Wisconsin Supreme Court. Because the petition was denied (B-1), this Petition for Writ of Certiorari arises from the decision by the Wisconsin Court of Appeals, District II, dated June 1, 1994.

Also, as the petitioner argued in the State Court of Appeals, in the case of a continuing violation (as opposed to a present consequence of a 1-time violation), the period of time for a statutory notice of injury rightly begins on the date of the last injury. See Argument II(A), *infra*. To the extent, as in this case, that a statute is construed so as to deny a "bona fide claim" based either on the petitioner's failure to strictly comply with the statute or on the incorrect conclusion regarding the date of the event causing the injury, the petitioner has been denied due process under the Fourteenth Amendment in that he has been refused his right to press his bona fide claim in court.

[6]The equal protection issue is raised herein by the petitioner for the first time because it only became ripe for consideration with the Wisconsin Supreme Court's intervening decision, *subsequent* to the Court of Appeals decision in the instant, in DNR v. City of Waukesha, 184 Wis. 2d. 178, 198, 515 N.W.2d 888 (1984). See Argument II(B), *infra*.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY.

A. THE PETITIONER'S INTEREST IN PROTECTED SPEECH INVOLVING (1) A STATE UNIVERSITY'S POLICY OF CONDITIONING BUSINESS CONTRACTS ON "CONTRIBUTIONS," AND (2) A UNIVERSITY ADMINISTRATOR'S ORDER TO A SUBORDINATE TO INTENTIONALLY LIE IF QUESTIONED ABOUT THE POLICY, OUTWEIGHED THE RESPONDENTS' "CONFIDENTIALITY INTEREST".

By purportedly basing their holdings on the application of the Pickering[7] balancing test, both the circuit court and the Wisconsin court of appeals implicitly concede that the petitioner's speech touched on a matter of public concern and was therefore protected (R-43:9; C-16 and A-12 - A-14, respectively).[8] In applying the Pickering factors, however, the court of appeals found, incredibly, (1) that the respondents had a *legitimate* "interest in confidentiality"[9] in the policy of punishing local

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[7]Pickering v. Board of Education, 391 U.S. 563 (1968).

[8]See, also, the Memorandum Decision in the companion unemployment benefits case, *supra*, J-1 - J-2, where the court concluded that the petitioner's "[d]isclosure of such a potential harm is *in* the State's interest, not against it" (emphasis added).

[9]The court of appeals relied nearly exclusively, but incorrectly, on the Wisconsin Supreme Court's fact-specific holding in Barnhill v. Board of Regents, 166 Wis. 2d 395, 409-10 (1991), where the plaintiff potentially contaminated an on-going research project by allowing a reporter to examine the survey questions.

businesses who did not "contribute" to the University and with respondent Spellman's order that the petitioner lie about it, and (2) that this supposed interest "weighs against Reich's free speech interest." A-13. Thus, the court found that the respondents had an overriding "confidentiality interest" in both an ethically and legally questionable policy change *and* in their order to an employee to intentionally mislead the public if asked about it.

This remarkable result raises serious questions. First, can the respondents legitimately have a "confidentiality interest" based solely on the fact that disclosure of an ethically and legally questionable practice might embarrass them or that it might strain a relationship between certain public officials and the disclosing employee? Second, should such an "interest" outweigh and effectively smother an employee's protected speech interest? If the answer to these questions is "yes", then virtually every whistleblower who is later punished for the disclosure of the matter for public concern will be left without remedy since the government's interest in not being embarrassed would outweigh the public's interest in the dissemination of the information.

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166 Wis. 2d at 404. The court emphasized that "confidentiality. . . [was] necessary to assure valid research results" and that the research laboratory (employer) "[could not] effectively function if it is unable to enforce its confidentiality rules." Id. at 411. In the instant case, however, the respondents can claim neither to have had a legitimate "confidentiality" interest based solely on avoiding embarrassment relating to an ethically and legally questionable policy or that the disclosure of the policy in any way impacted the University's ability to function. Indeed the fund-raising campaign in question was successfully completed and the auditorium has since been built.

Also, the instant case is distinguishable from Barnhill with regard to the "time, place, and manner" of the petitioner's disclosure (had the plaintiff in Barnhill only discussed his concerns with the reporter and not released survey questions, the impact on the employer's interest would have been lessened). In contrast to the employee in Barnhill, Reich neither contacted the media or took the initiative in "going public"; rather, he simply responded honestly when asked about the objectionable policy.

In addition to its dubious conclusion that the respondents had a legitimate confidentiality interest, the court of appeals erred in failing to afford the petitioner's speech sufficient weight. After finding, contrary to the record, that the petitioner asserted only his belief that the university's policy was "immoral",[10] the court concluded, against the great weight of precedent, that an employee's interest in free speech involving "only. . . ethical concerns" should be afforded "less weight" than "when illegal conduct is exposed." A-14. As recently as this past June, however, Wisconsin's own Supreme Court, subsequent to the state court of appeals decision in the instant case, expressly reiterated the long-established rejection of the notion that an employee's speech must involve "illegal conduct" or the virtual equivalent thereof:

> An accusation of illegality is not required to render statements of apprehension about the use of public monies a matter of a public concern; and allegation of waste can rise to that level. . . . Moreover, even if the. . . suspicions were subsequently demonstrated to be incorrect, absent proof of false statements knowingly or recklessly made the plaintiff's speech in a matter of public concern is entitled to First Amendment protection.

Burkes v. Klauser, 185 Wis. 2d 309, 336, ___ N.W. ___ (1994)

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[10]The court of appeals simply mischaracterizes Reich's beliefs regarding the propriety of the policy. At the time of Reich's disclosure, Reich believed that the policy constituted mismanagement and an abuse of his authority, and may have resulted in a substantial waste of public funds. R-41:3-4; E-2 - E-4. Reich viewed respondents' policy as a "strong arm tactic" and "morally wrong". R-21:532. Reich also believed the actions to be in violation of fund-raising ethical standards. R-41:3-4; E-2 - E-4. Based upon his own fund-raising training and experience (R-23:2-5; D-2 - D-5), Reich found the University's conditioning of its business on contributions to be unfair and in violation of the public trust. Thus, the record makes clear that Reich neither approved of the policy nor was prepared to lie about it.

(emphasis added; additional citations omitted). See, also, Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2d Cir. 1983); Czurlanis v. Albanese, 721 F.2d 98, 104 (3d Cir. 1983). As the 10th circuit observed, "[s]peech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interests." Conaway v. Smith, 853 F.2d 789, 797-98 (10th Cir. 1988).

The only relevant inquiry for the court is thus whether Reich could reasonably have believed that a public concern was implicated by the policy. Given that state bidding, expenditure, and disclosure rules were clearly implicated, there can be little doubt that the speech touched on matters of public concern. Irregularities in public bidding procedures are clearly of public concern. Martinez v. City of Opa-Lock, Fla., 971 F.2d 708, 712 (11th Cir.1992). Moreover, though not irrefutable evidence of a public concern, the intense press coverage and subsequent "damage control" efforts by the University clearly suggest that the public has an interest in whether a major public university was, as a matter of policy, engaging in the fund-raising equivalent of a shakedown operation and ordering its employees conceal it.[11]

The court of appeals' conclusions about other governmental

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[11]See I-1 - I-30. As noted by current University Chancellor Gaylon Greenhill, the court of appeals decision generated a "media barrage". I-26. As part of the resulting damage control effort (and in a transparent effort to "chill" future disclosure by employees of ethically questionable policies), the University disseminated inaccurate information in a widely-distributed internal memorandum and a press release. In the memo, Greenhill, ignoring the fact that the respondents twice *threatened* to fire the petitioner, wrongly asserts that the petitioner "*claim[ed]* that he was 'fired'". I-26 - I-27 (emphasis added). In the press release, the University resurrects the discredited claim, long-since abandoned by the respondents, that it was the unilateral actions of the *petitioner* (rather than respondent Spellman's policy) that resulted in the cancellation of The Register's printing contract. I-28 - I-29.

interests associated with effective office functioning are likewise unconvincing. Discussing the respondents wild and unsubstantiated claims regarding office disruption and the time, place, and manner of petitioner's speech, the court of appeals *theorizes* that the plaintiff's disclosure "damaged any close and personal working relationship that he may have had. . ." with his superior. A-13 (emphasis added). Placing aside for a moment the clearly speculative nature of the courts statement, even where, unlike in this case, defendants in a whistleblowing case establish some degree of disruption of a "working relationship" as a result of a plaintiff's speech, "[judicial] deference to the employer's judgment" in taking "remedial" is only appropriate "when close working relationships are essential to fulfilling public responsibilities". Connick v. Myers, 461 U.S. 138, 151-52 (1983); *cf.* Pickering, 391 U.S. at 569-73 (where there was no close working relationship between the speaker and the retaliating party, and consequently no impact on operations "beyond the tendency to anger the [latter]").

In the case at bar, Reich and Spellman never enjoyed a "close working relationship", before or after Reich's disclosure. In fact, the respondents admit that "[s]hortly after Spellman [was hired] he and Reich were at odds with each other". R-19:7. Yet, the two functioned effectively in their individual roles until Spellman felt the need to retaliate against Reich. Nor was there any showing that any "actual, material and substantial harm to [the employer's] operations... result[ed from Reich's] speech",[12] much less that "office harmony was shattered" as claimed by the respondent in circuit court (but abandoned in the court of

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[12]Barnhill, 166 Wis. 2d at 419-20 (citing Rankin v. McPherson, 483 U.S. 378, 388-89 (1987), and Conner v. Reinhard, 847 F.2d 384, 391 (7th Cir.), cert. denied, 477 U.S. 856 (1988)).

appeals[13]). The fact that respondent Connor and later Chancellor Greenhill failed to verify allegations of office disruption in his their transfer memos (R-41:Ex.H; E-30 - E-31; 41:Ex.I; E-35 - E-36) lends credence to the petitioner's claims that the real motivation was retaliation. Beiluch v. Sullivan, 999 F.2d 666, 672 (2nd Cir. 1993).

Thus, the court's "findings" regarding the impact of Reich's speech are "merely speculative." Barnhill v. Board of Regents, 166 Wis. 2d 395, 420, 479 N.W.2d 917 (1991). In fact, Reich indicated that his presence in the office was not "at all disruptive" (R-21:463) and went on to testify that it was respondent Spellman's treatment of staff that made things "difficult." R-21:464; R-23:8. Meanwhile, *the respondents* characterize Reich's relationship with Connor as "still. . . good" (R-19:8). Moreover, given that there clearly exists a dispute as to the material question of whether the petitioner's speech created a disruption in the workplace, the granting of summary judgement was improper. See Dunn v. Carrol, 40 F.3d 287, 293 (8th Cir. 1994); Schiller v. Moore, 30 F.3d 1281, 1284 (10th Cir. 1994).

Also, a prima facie showing that a defendant may have proper reasons for the challenged conduct "does not alone invoke qualified immunity. . . ." Walter v. Morton, 33 F.3d 1240 (10th Cir. 1994). The focus "remains of whether the plaintiff has produced facts property evidencing improper intent" Id. (additional citations omitted). In the case at bar, there is ample evidence that the respondent's actions were improperly motivated.[14] Both respondents Connor and Spellman reprimanded the petitioner, Connor ordering him to obey the

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[13]Compare the respondent's circuit court brief (R-19:28-29) with their subsequent brief in the court of appeals, p. 35.

[14]Hicks v. City of Watonga, 942 F.2d 737, 749 (10th Cir.1991) (quoting Lewis v. City of Ft. Collins 903 F.2d 752, 758 (10th Cir.1990).

Spellman's orders regardless of his feelings about their propriety. R-23:4-5; D-5 - D-6. Immediately after Connor admonished Reich, stating "it is not up to you to take Mike's [Respondent Spellman's] dirty laundry downtown" (R-21:338), Spellman threatened the petitioner with unnamed action, which turned out to be an involuntary relocation of the petitioner's office to an isolated, converted storage room. R-23:5; D-5. Then, after the possibility of "disruption" was eliminated by the respondent's ostracizing and isolation of the petitioner, a termination was threatened (R-41:Ex.A; E-10 - E-11) and, several months later, Reich received notice that he would be transferred and demoted (R-41:Ex. H; E-30 - E-31). Clearly, in presenting uncontested evidence of the preceding facts, the petitioner established that he "has the kernel of a case in hand." Elliott v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991).[15]

Thus, the court of appeals' conclusion that "a reasonable public official could believe that Reich's breach of confidentiality, disruption of a close and personal working relationship, and [the] time, place, and manner of speech were sufficient to permit his reprimand" is at once both mystifying and irrelevant. A-13 (emphasis added). Aside from the fact that there was no "close and personal working relationship" between the petitioner and respondent Spellman to be "disrupted" and no concomitant showing of "office disruption," the court fails to indicate how the factors it cites justified the numerous separate and disciplinary actions above and beyond the initial "reprimand," taken against the petitioner, culminating in his arbitrary transfer and demotion.

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[15]Since the Supreme Court's decision in Siegert v. Gilley, 500 U.S. 226 (1991), every federal circuit that has considered the question has concluded that a plaintiff is not required to come forward with "direct, as opposed to circumstantial evidence" of an illegitimate intent in order to overcome a public official's claim of qualified immunity. Id., 500 U.S. at 235 (Kennedy, J., concurring). In addition to Elliott, see, e.g., Thompkins v. Vickers, 26 F.3d 603, 608-09 (5th Cir. (1994).

B. IT WAS CLEARLY ESTABLISHED IN 1991 THAT A GOVERNMENT EMPLOYER COULD NOT RETALIATE AGAINST AN EMPLOYEE WHO REFUSES TO OBEY THE EMPLOYER'S ORDER TO LIE ABOUT AN ETHICALLY AND LEGALLY QUESTIONABLE POLICY.

As noted above, both the circuit court and the court of appeals concede that the petitioner's speech regarding a new University policy (contrary to public bidding rules traditionally applied) of conditioning contracts with local businesses on "contributions" and of intentionally misleading the public about the policy was a matter of public concern worthy of some degree of protection under the first amendment. Thus, the pertinent inquiry for each court should have been whether it was clearly established in 1991 that state university administrators could not retaliate against a subordinate who refuses to obey a superior's order to lie to an interested member of the general public about the policy.

Protection of whistle blowing was recognized by statute in Wisconsin as early as 1983 and protected as early as 1985. Wis. Stats. § 230.80 et. seq., and § 895.65. The Wisconsin Supreme Court concluded in 1991, that by 1985 ". . . there was already a wealth of case law on a public employee's First Amendment right to speak on matters of public concern"; it was thus "clearly established" that a state official may not retaliate against an employee in any way that infringes on the employee's constitutionally protected interest. Barnhill, 166 Wis. 2d at 409-10.

Qualified immunity does not protect official action simply because it had not previously been held unlawful; rather, it is only required that the unlawfulness of the action be apparent in light of pre-existing law. Anderson v. Creighton, 483 U.S. 635, 639-40 (1987); Auriemma v. Rice, 910 F.2d 1449, 1455-56 (7th

Cir. 1990). The "clearly established" inquiry does not require the existence of analogous cases "involving the exact fact pattern of the case at bar." Burkes, 185 Wis. 2d at 332, ___ N.W. __ (1994) (relying on Anderson, 483 U.S. at 639). Actions taken by public officials "are considered objectively unreasonable. . . if the right allegedly violated is clearly established in a sufficiently particularized sense at the time of the actions at issue". Hall v. Ryan, 957 Fed.2d 402, 404 (7th Cir. 1992).

Moreover, an official who has ready access to legal advice and who has received particularized training or can be assumed to have advanced administrative skills may fairly be held to a higher standard of knowledge of the applicable constitutional law. Soltani v. Smith, 812 F.Supp. 1280, 1303 (D.N.H. 1993). Thus, if the "reasonableness" element of the analysis is to have any meaning at all, then the question to be answered is not whether any reasonable person would have viewed the actions of the respondents as violative of the appellant's constitutional rights, but rather whether a reasonable person in like circumstances, namely high-ranking administrators of a state-run university (specifically, the Chancellor and Assistant Chancellor), would have been sufficiently aware of the law under the circumstances to know that their actions violated it.

In the instant case, there is little doubt that the respondents were aware of their legal standing by June of 1991 when the petitioner was transferred and demoted. Throughout the preceding winter and spring, a series of negotiations took place involving Reich, his attorney, the respondents, and their counsel occurred. See Argument II(B), *infra*. Respondents' counsel Stathas apparently continued to provide on-going counsel to the respondents through June of 1991, as evidenced by the fact that he was "copied" on at least one of respondent Connor's letters to Reich. R-41:Ex. H; E-30 - E-31. Additionally, the respondents, at no personal expense, could and eventually did utilize the legal expertise and assistance of the state Attorney General's office.

Thus, the respondents, who had free and ample access to legal counsel "who should have explained. . . the import" of existing law to them, should have been found to have been in a position to reasonably know or be expected to know that their conduct was unconstitutional. Jones v. Peruit & Mauldin, 808 Fed.2d 1435, 1442 (11th Cir.) vacated in part on other grounds on her'g, 822 F.2d 998 (11th Cir.), reh'g en bank granted, 833 F.2d 1436 (11th Cir. 1987); see, also, Wood v. Strickland, 420 U.S. 308, 331 (1975) (Powell, J., concurring in part and dissenting in part). As high-ranking state university administrators with ready access to taxpayer subsidized legal advice, the respondents should be held to a commensurate standard of knowledge of applicable law. The court of appeals should therefore have found that the law with regard to the petitioner's speech and retaliatory job transfers was clearly established at the time of the respondents' actions.

C. BOTH LOWER COURTS ERRED IN FAILING TO ISOLATE AND ANALYZE NUMEROUS DISPUTED FACTS AS TO THEIR MATERIALITY.

Various facts in dispute are material in that relate directly to the respondents' intentions and motives. R-24:7-20; (appeal) Brief of Petitioner-Appellant, 12-26. In their trial court brief, the respondents incorrectly claimed that:

> (1) the sole target [of the petitioner's speech] was [his] immediate supervisor; (2) the speech was nothing other than the disclosure of a confidence; (3) the expression of loyalty and the need for discipline were needlessly ruptured . . .;
> (4) the [petitioner] admits that office harmony was shattered.

R-19:41. Each of these wild, unsupported assertions are contested and material in that they go to the key question of whether the respondents were, as they claim, motivated by a

desire to maintain effective office functioning (rather than by retaliation) and therefore could not have known their actions were "clearly unconstitutional". In Hanson v. Bennett, for example, the 7th Circuit held that it "lack[ed] jurisdiction over the issue of qualified immunity" since there was "a disputed factual question regarding [the state official's] purpose" in interfering with the plaintiff's speech right. 948 Fed.2d 397, 399-400 (7th Cir. 1991). As in the present case, the issue was whether the defendant "intended to suppress [the plaintiff's] speech or whether he genuinely believed that [he was] justified . . .". Id. In Broderick v. Roache, the 5th Circuit found that the actions of the defendant were "sufficient to create a genuine and material fact as to whether [the defendant] was motivated by desire to retaliate against [the plaintiff] for exercising his First Amendment rights" such that summary judgment based on qualified immunity was precluded. 996 Fed.2d at 1299 (relying on Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).[16]

But while, in the case at bar, a material question of fact exists with regard to whether, in taking job actions against the petitioner, the respondents were motivated by retaliation or the desire to maintain office functioning, neither the circuit court nor the court of appeals articulated a rationale in support of their conclusions that disputed facts were not material. In fact, neither

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[16]The defendants motivation was also taken into account in denying a summary judgment motion in Feliciano-Angulo v. Rivera-Cruz, 858 Fed.2d 40 (1st Cir. 1988). Reviewing at length the impact of Harlow v. Fitzgerald, 457 U.S. 800 (1982), the court expressly found "no merit" in argument that the Supreme Court in Harlow intended to "render immaterial any inquiry into the defendant's state of mind, even where, as here the defendant's motivation in effecting the discharge is an essential element of the plaintiff's constitutional claim." 858 Fed.2d at 45. The court also rejected the defendant's invitation to accept *his* version of the motivation behind the plaintiff's dismissal since such an interpretation of Harlow would permit "'an official to be granted qualified immunity as a matter of law even though the principal disputed question of fact in the case -the true purpose of intent motivating the officials conduct - remains unresolved.'" Id. at 45-46 (citation omitted).

court made any express, particularized findings regarding the disputed facts identified by the petitioner. Instead, the circuit court compounded its failure to determine the materiality of disputed facts by acknowledging that material disputes do exist, noting at one point that "[t]here is no lack of controversy as to the facts and the parties' motivations" (R-43:4-5; C-6) (emphasis added) and that "[t]his could then readily become a three-way issue and a jury would be called upon to sort these claims out" (R-43:6; C-9). Likewise, the court of appeals acknowledged the existence of "several factual disputes", but without explanation deemed them immaterial. A-7.

The courts' failure to isolate and analyze "disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn"[17] is alone enough to require a remand. Pasquino v. Prather, 13 F.3d 1049 (7th Cir. 1994).[18]

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[17]Grams v. Boss, 97 Wis.2d 332, 338, 294 N.W.2d 473 (1980)

[18]The Wisconsin Supreme Court has also cautioned against "look[ing] at the law in the abstract" in applying "the test for qualified immunity"; "[r]ather, the test. . . is whether the law was clear in relation to the specific facts confronting the defendants at the time of the action." Burkes, 185 Wis. 2d at 331, __ N.W.2d __ (citing Anderson, 483 U.S. at 639-40); and Green v. Carlson, 826 F.2d 647, 649 (7th Cir. 1987)). An examination of relevant circumstances is no less relevant in cases involving a retaliatory transfer or demotion (as opposed to dismissal). See, e.g., Nereida-Gonzalez v. Tirado-Delgado, 990 Fed.2d 701 (1st Cir. 1993); and Rodriguez-Pinto v. Tirado-Delgado, 982 Fed.2d 34 (1st Cir. 1993).

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PETITIONER'S STATE CLAIM.

A. WIS. STATS. § 893.82 AS APPLIED DEPRIVED THE PETITIONER OF HIS RIGHT TO DUE PROCESS.

In interpreting and applying notice-of-claim statutes, it is well established that, in a case of a continuing violation, the period for filing a charge begins on the date of the last injury. Bazemore v. Friday, 478 U.S. 385 (1986). In deciding whether an employer's violations are of a continuous nature for statute-of-limitations purposes, a court must distinguish between a present consequence of a one-time violation, such as in Delaware State College v. Ricks, 449 U.S. 250 (1980), which does not extend the time limit, and a continuation of a violation into the present, which does, as in Bazemore. Beavers v. American Cast Iron Pipe Co., 975 F.2d 792, 796-800 (11th Cir.1992). The 7th circuit elaborated upon this distinction in Webb v. Indiana Nat. Bank, 931 F.2d 434, 438 (7th Cir.1991):

> . . . in the case of a continuing unlawful practice, every day that the practice continues is a fresh wrong for purposes of the statute of limitations. . . Did Ricks abolish this principle? We think not. We adopt the distinction . . . between the present consequence of a one-time violation and the continuation of the violation into the present.

(Citations omitted.) Thus, for a *continuing* violation, the period for filing a charge begins on the date of the last injury. Lowell v. Glidden-Durkee, Div. of SCM Corp., 529 F.Supp. 17, 20 (1991).

In the case at bar, the petitioner was first notified of a "fresh wrong" (his involuntary transfer and demotion) in a memo from respondent Connor dated June 18, 1991. R-41:Ex.H; E-30

- E-34. Given that the petitioner filed his Notice of Claim on September 30, 1991, well within the 120-days of the June "fresh wrong", the court of appeals should have found the notice to have been timely. It is beyond dispute that the highly equivocal "termination letter" from respondent Connor to the petitioner, dated January 31, 1991 (the termination was never carried out) and the June 1991 notice and subsequent transfer and demotion are distinctly different actions.

Yet, the court of appeals found that "notice of injury" was provided by the January letter. Thus ignoring Bazemore's "fresh wrongs" rule, the court erroneously applied the Ricks "continuing effects of a single injury" approach. By applying the more restrictive Ricks rule, the court affirmed a reading of § 893.82 that results in an unconstitutional deprivation of the petitioner's right to due process. If the court of appeals is correct, then the petitioner (and any plaintiff) is precluded from proceeding on a claim, *even if notice is filed within the 120-notice period*, solely because a *prior* injury occurring before the 120-day period, but different or distinct from the subsequent injury, may have occurred.

This is clearly antithetic to the principles enunciated by the Court in Bazemore. Moreover, such a constrained reading of a notice-of-claim statute clearly impacts a potential plaintiff's right to due process in that he is precluded from bringing a bona fide claim merely because a earlier, separate possible cause of action that was the subject of negotiations was not acted upon. Aside from being fundamentally unfair, such a reading of the notification statute virtually removes any incentive for defendants to take claims seriously and attempt to resolve them short of court action. (As noted below in Argument B, the petitioner's efforts to resolve this dispute continued through the spring of 1991.) To be free to take subsequent retaliatory action, all an employer need do is drag out negotiations beyond a perceived 120-day notice period associated with a prior "injury" (in this case, the highly equivocal *threat* of termination which was never carried out was

coupled with an offer to find the petitioner another job).

Thus, in addition to being contrary to due process, an overly broad application of the Ricks rule is contrary to public policy. Moreover, given the facts in this case, the rule enunciated in Bazemore line, rather than Ricks, should have controlled.

B. EVEN IF THE "TRIGGERING DATE" FOR NOTICE OF CLAIM WAS JANUARY 31, 1991, IN LIGHT OF THE INTERVENING CASE OF DNR V. CITY OF WAUKESHA, EQUAL PROTECTION AND DUE PROCESS REQUIRE THAT SUBSTANTIAL RATHER THAN STRICT COMPLIANCE BE REQUIRED TO COMPLY WITH NOTICE REQUIREMENTS.

On June 1, 1994, subsequent to the court of appeals decision in the instant case, the Wisconsin Supreme Court, in DNR v. City of Waukesha, 184 Wis. 2d 178, 515 N.W.2d 888 (1994), reaffirmed the principle that substantial rather than strict compliance satisfy the notice-of-claim requirements set forth in § 893.80 for actions "brought or maintained against any . . . political corporation, government subdivision or agency thereof nor against any officer, official, agent, or employee of [same] for actions done in their official capacity or in the course of their agency or employment." Similarly, in the case of § 893.82, an order dismissing a claim was reversed "on that ground" that the plaintiff had "substantially complied" with the statute. Daily v. Wis. University, Whitewater, 145 Wis. 2d 756, 762, 429 N.W.2d 83 (1988).[19]

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[19]The court in Daily deemed legislative changes to the notice of claim statute, including the addition of a provision directing that its provisions "shall be liberally construed to effectuate this intent" (paragraph 1(b)--see H-5, *infra*), as an attempt "to liberaliz[e]. . . the statute to avoid. . . harsh results. . .". Id., 145 Wis. 2d at 759, 761. Following the petitioner's injuries in this case, the legislature back tracked, deleting paragraph 1(b) and replacing it with paragraph

Nevertheless, if, at the time of the injuries to the petitioner during the fall of 1990 and first half of 1991, § 893.82 as it then existed is deemed to have required substantial rather than strict compliance, then the co-existence of §§ 893.80 and 893.82 raises equal protection concerns pertinent to this case. First, which statute applies when a claim is made against both a *"governmental body"* (in this case, the Board of Regents of the University of Wisconsin), thereby triggering § 893.80, and *state employees* purportedly covered under § 893.82.[20] (Moreover, are University Administrators considered "officers" under § 893.80?) Given that (a) the petitioner is clearly in the process of suing a governmental body (the Board of Regents) and University "officers" (the current assistant chancellor and former chancellor), rather than simply state "employees", and that (b) the acts which have given rise to this claim were performed by the officials "in their official capacity or in the course of their agency or employment," the issue of the adequacy of notice received by the respondents should arguably have been decided under § 893.80 rather than § 893.82.

Secondly, in light of the decision in DNR v. City of Waukesha, it is clear that the co-existence of §§ 893.80 and 893.82 raises both equal protection and due process[21] concerns

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(2m) which expressly requires strict compliance. 1991 ACT 39, §§ 3579 TO 3582, effective August 15, 1991.

[20]Although § 893.80 purports to cover "[c]laims against government bodies or officers, agents or employees. . ., given the co-existence of § 893.82, which regulates "[c]laims against state employees", one reading of § 893.80 is that it applies only to municipal-level employees or other government employees other than state employees.

[21]At a minimum, substantive due process requires legislation be fair and reasonable in content as well as application. "[T]he reason for the deprivation [of a right to the excluded class] may not be so inadequate that the judiciary will characterize it as 'arbitrary'". Jeffries v. Turkey Run Consolidated School Dist., 492 F.2d 1, 3-4 (7th Cir. 1974).

which, given the intervening nature of the case and its implications for the petitioner, are now ripe for review. The equal protection clause requires consideration of whether a statutorily created classification constitutes arbitrary discrimination. Loving v. Virginia, 388 U.S. 1 (1967). Thus, when one statute, to a plaintiff's detriment, arbitrarily exempts *state* employees from liability by affording them a greater degree of procedural protection than is afforded to other public employees, equal protection is implicated.

Essentially, § 893.82 creates a "protected class" of *state* governmental employees, who have for some reason been deemed worthy of greater protection than other governmental employees and potential plaintiffs. The obvious question, considering the co-existence of two notice-of-injury statutes that provide difference levels of protection for municipal and state employees (and different barriers for those attempting to prosecute a claim against one or the other) is: Why should state employees be entitled to greater protection (and potential plaintiffs be denied bona fide claims[22]) in comparison to municipal and other

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[22]Section 893.80 is clearly more flexible and "pro-plaintiff" than § 893.82. If, for example, a claimant does not literally comply with § 893.80 the claim does not necessarily fail so long as "the [municipality] had actual notice. . . and the claimant shows. . . that the delay or the failure to give the requisite notice had not been prejudicial to the [municipality]." DNR v. City of Waukesha, 184 Wis. 2d at 197 (quoting from § 893.80(1)(a)). The court soundly reasoned that "notices of claim should be construed so as to preserve bona fide claims. . . . "[I]n furtherance of this policy, only substantial, and not strict, compliance with notice statutes is required." Id. at 198.

In contrast, even before § 893.82's compliance standards were explicitly legislatively heightened in 1991 (see note 19, *supra*), for claims against a state employees under that section (as opposed to against a municipal employee under §893.80), substantial compliance may not have been sufficient. Renner by Brennan v. Madison General Hosp., 151 Wis. 2d 855, 447 N.W. 2d 97 (App.1989) review denied 451 N.W. 2d 297. It has also been held that non-compliance with requirements of § 893.80 must be plead as the defense by a municipality. Figgs v. City of Milwaukee, 121 Wis. 2d 44, 53, 55-56, 357

governmental employee employees (and plaintiff with claims against them)? Numerous jurisdictions have recognized that distinctions resulting from notice statutes that immunize a particular class of defendants are unconstitutionally discriminatory if they create an arbitrary and unreasonable classification.[23]

Statutory notice of claim requirements must "fairly and substantially relate to [a] legitimate legislative objective." Carson v. Maurer, 424 A.2d 825, 834 (1980); see, also, Reich v. State Highway Department, 386 Mich. 617, 623, 194 N.W.2d 700, 702 (1972). The Wisconsin Supreme Court has emphasized that "'the purpose of the notice of claim statute is to afford the municipality an opportunity to compromise and settle [the] claim without litigation.'" 184 Wis. 2d at 195 (quoting Figgs v. City of Milwaukee, 121 Wis. 2d 44, 53, 357 N.W.2d 548 (1984) [additional citations omitted]). Although the court was referring to § 893.80, the same purpose rationally should and, according to the legislature does, apply to § 893.82.[24]

Given that §§ 893.80 and 893.82 share the same statutory (and public policy) objective, and that, in the case of § 893.80 *substantial* rather than strict compliance has been found to be in furtherance of that objective, the suggestion that, for some

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N.W.2d 548 (1984).

[23]See, e.g., Henderson Clay Products v. Edgar Wood, Etc., 451 A.2d 174 (N.H. 1982); Fujioka v. Kam, 55 Hawaii 7, 12, 514 P.2d 568, 571-72 (1973); Skinner v. Anderson, 38 Ill.2d 455, 459-60, 231 N.E.2d, 588, 590-91 (1967); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143, 148 (Okla. 1977); Broome v. Truluck 270 S.C. 227, 230-31, 241 S.E.2d 739, 740 (1978); Kallas Millwork Corp. v. Square D. Co., 66 Wis.2d 382, 383-84, 225 N.W.2d 454, 455 (1975).

[24]Similarly, the purposes of § 893.82 include to provide the state Attorney General "with adequate time to investigate claims" and "with an opportunity to effect on a compromise without a civil action". § 893.82(1)(a)(1) and (2); H-5.

unexplained reason, the opposite is true for § 893.80 is, on its face, dubious. Absent any articulable or apparent rationale for this distinction, the pertinent inquiry in light of the DNR v. City of Waukesha decision is whether, by establishing different standards for bringing suit against government officials based solely on whether potential defendants work directly for the state as opposed to some other governmental agency, § 893.80 and § 893.82 violate the petitioner's right to equal protection and due process under the 14th Amendment.

Assuming arguendo that the court of appeals was correct in defining the injury date as January 31, 1991, it can be observed, without diminishing or relinquishing the petitioner's "fresh wrong" argument, that the petitioner would obviously have an easier burden establishing substantial compliance with notice-of-claim requirements, as required by § 893.80, as compared with establishing strict compliance, as required by § 893.82. As argued by the petitioner in his Petition For Review filed in the Wisconsin Supreme Court (pages 28-35), substantial compliance with notice requirements was provided in the instant case by two letters from petitioner's counsel, Russell W. Devitt, to respondent then-Chancellor Connor, dated April 2, 1991 (R-41:Ex.E.; E-20 - E-22) and May 7, 1991 (R-41:Ex.G.; E-25 - E-29), within 120 days of the so-called January 31 "triggering date". These letters clearly satisfy the criteria, as set forth in DNR v. City of Waukesha, 184 Wis. 2d at 198, for establishing substantial compliance. In that case, as in the instant, case prior to the official filing of claim, the parties, entered into negotiations in an effort to resolve the matter. Although those negotiations ultimately did not bear fruit, the court concluded that "[c]learly, after four years of negotiations, the city had actual notice of the claim and was not prejudice by the state's failure to give the requisite notice." 184 Wis. 2d at 197.

Similarly, in the case at bar, the respondents were provided ample notice of claim, both in the form of letters from Attorney Devitt (discussed below) and as a result of meetings during which

the actions that gave rise to the claim and possible resolutions were discussed with then Chancellor Greenhill and University counsel Charles Stathes, who remained involved in the University's handling of this case at least up to the petitioner transfer and demotion. R:41:Ex.H; E-30 - E-31. Moreover, the respondents acknowledge that they were notified on April 2 that Reich's rights had been "violated" (R-19:12) and on May 7 of the petitioners first amendment ("whistleblower") claim and the Reich would view any termination that resulted to be "without just cause." (R-19:13).

Thus, even if January 31, 1991 was the "triggering date" for § 893.82's notice requirement, the information required under § 893.82(3) was amply provided within 120 days of that date. Indeed, the respondents tacitly admitted that they had notice of both the nature and potential of a claim "adequate time to investigate claims" when, in their circuit court rebuttal brief, they stated that Attorney Devitt, subsequent to the January 31, 1991 memo, "complained bitterly and threatened legal action, which ultimately developed into this lawsuit." R-33:11.

It is sadly ironic that those efforts, which were in comport with the "purposes" of § 893.82, were ultimately held against the petitioner by the circuit court and court of appeals. Upon reflection, it appears that the respondents cynically factored the 120 day notice requirement into their decision to make the effective date of the so-called termination six-months past the notification date. This case thus raises the policy issue relating to a party's ability to manipulate § 893.82 to its own ends rather than to effectuate its purposes of providing adequate time to investigate a claim and reach a compromise.

CONCLUSION

For the reasons set forth above the Court should grant this Petition For Writ of *Certiorari*.

Respectfully submitted,

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COURT OF APPEALS
DECISION
DATED AND RELEASED

June 1, 1994

No. 93-1989

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DALE E. REICH,

Plaintiff-Appellant,

v.

MICHAEL SPELLMAN, ASSISTANT CHANCELLOR, UNIVERSITY RELATIONS, UNIVERSITY OF WISCONSIN-WHITEWATER, JAMES R. CONNOR, FORMER CHANCELLOR, UNIVERSITY OF WISCONSIN-WHITEWATER, and BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Walworth County: John R. Race, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

BROWN, J. This is a "whistleblower" case. Dale E. Reich brought against his former superiors under 42 U.S.C. § 1983 and §895.65, STATS.,[1]

---

[1] Section 895.65 STATS., provides:

(1) In this section:

(a) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in party, of a penalty.

(b) "Employe" means any person employed by any governmental unit except:

1. A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of the ch. 13.

2. A person who is, or whose immediate supervisor is, assigned to an executive salary group under s. 20.923.

(c) "Governmental unit" means any association, authority, board, commission, department, independent agency, institution, office, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature, the office of the governor and the courts. "Governmental unit" does not mean any political subdivision of the state or body within one or more political subdivisions which is created by law or by action of one or more political subdivisions.

(d) "Information" means information gained by the employe which the employe reasonably believes demonstrates:

1. A violation of any state or federal law, rule or regulation.

2. Mismanagement or abuse of authority in state government, a substantial waste of public funds or a danger to public health and safety.

(2) An employe may bring an action in circuit court against his or her employer or employer's agent, including this state, if the employer or employer's agent retaliates, by engaging in a disciplinary action, against the employe because the employe exercised his or her rights under the first amendment to the U.S. constitution or article I, section 3, the Wisconsin constitution by lawfully disclosing information or because the employer or employer's agent believes the employe

(continued...)

([1] ... continued)

so exercised his or her rights. The employe shall bring the action within 2 years after the action allegedly occurred or after the employe learned of the action, whichever occurs last. No employe may bring an action against the department of employment relations as an employer's agent.

(3) If, following the close of all evidence in an action under this section, a court or jury finds

arguing that they retaliated against him because he exercised his First Amendment right to free speech. The trial court granted summary judgment against him on both claims. We affirm the trial court on

---

that retaliation was the primary factor in an employer's or employer's agent's decision to engage in a disciplinary action, the court or jury may not consider any evidence offered by the employer or employer's agent that the employer or employer's agent would have engaged in the disciplinary action even if the employe had not disclosed, or the employer or employer's agent had not believed the employe disclosed, the information.

(4) If the court or jury finds that the employer or employer's agent retaliated against the employe the court shall take any appropriate action, including but not limited to the following:

(a) Order placement of the employe in his or her previous position with or without back pay.

(b) Order transfer of the employe to an available position for which the employe is qualified within the same governmental unit.

(c) Order expungement of adverse material relating to the retaliatory action or threat from the employe's personnel file.

(cm) Order the employer to pay compensatory damages.

(d) Order the employer to pay the employe's reasonable attorney fees.

(e) Order the employer or employer's agent to insert a copy of the court order into the employe's personnel file.

(f) Recommend to the employer that disciplinary or other action be taken regarding the employer's agent, including but not limited to any of the following:

1. Placement of information describing the agent's action in his or her personnel file.

2. Issuance of a letter reprimanding the agent.

(continued...)

(' ... continued)

3. Suspension.

4. Termination.

the 42 U.S.C. § 1983 claim because Reich's superiors are entitled to qualified immunity. We also affirm on the state claim because we agree with the trial court that the event causing the injury occurred on January 31, 1991 and that Reich therefore violated our notice of claim statute.

Reich worked for the University of Wisconsin-Whitewater as Director of News and Publication. Defendant James R. Connor was the Chancellor at the University of Wisconsin-Whitewater. Defendant Michael Spellman was Reich's immediate supervisor.

In the spring of 1990, Spellman informed Reich that The Register, a company which had a contract to print the newspaper of the University of Wisconsin Foundation-an alumni association-would not receive a new printing contract for the foundation's newspaper. This was because it had not made a sufficient contribution to a fund-raising campaign that Spellman was conducting. If The Register inquired as to why it lost the printing contract, Spellman advised Reich to tell The Register only that the foundation was unhappy with the quality of the printing. Spellman further advised Reich that The Register's problems were sufficient to take the business elsewhere.

Reich believed that it was morally incorrect to withdraw the contract grounded upon The Register's refusal to make a substantial donation. He was unsure of whether this was legal or not. Although Reich believed that Spellman's

actions were morally incorrect, he did not confront Spellman or Connor with his views in the spring of 1990. Nor did he contact the district attorney's office or other law enforcement authorities.

In the fall of 1990, Reich received a telephone call from The Register asking why it had not received the printing job for the fall issue of the foundation's newspaper. Reich first told The Register that it had not received the contract because of printing problems. Later, Reich called The Register back and informed it that in addition to the printing problems, The Register had lost the contract because it had not donated a sufficient contribution to the fund-raising campaign.

After Spellman found out about Reich's disclosure to The Register, he chastised Reich for breaching management confidence and no longer confided in Reich. Spellman alleges that following Reich's disclosure, Spellman and Reich avoided each other more often, and that the situation between them had a negative impact upon the staff.

On November 19, 1990, Reich submitted a letter of resignation to Connor, giving no reasons. A week later, Connor refused to accept the resignation and stated that he would find Reich another position on campus. Reich alleges the Connor indicated he would tear up the resignation letter and that his resignation was withdrawn.

On January 31, 1991, Connor sent

Reich a letter informing him that he was unable to find a job on campus for Reich and he was accepting Reich's November 19, 1990 letter of resignation. Reich's last day of employment was to be June 30, 1991. After receiving this letter, Reich objected to the proposed termination of his employment, claiming that his resignation had been withdrawn. However, Connor did not rescind the January 31 termination letter between its issuance and June 18, 1991. In fact, Connor strongly reaffirmed the January termination letter twice during that time period. Reich's attorney sent Connor a letter on May 7, 1991, stating that if Reich was terminated, his rights under §895.65 STATS., would be violated. On June 18, 1991, Connor offered Reich another position at the university which reduced his salary from $50,000 a year to $35,000 a year. Reich alleges that he was told he could either accept this reassignment or be fired. Reich filed a Notice of Claim on September 30, 1991, alleging that the event causing injury was the June 30, 1991 transfer, demotion and reduction in pay.

Reich then filed suit against the defendants in December 1991, alleging that they had violated 42 U.S.C. § 1983 and § 895.65 STATS., by abridging his First Amendment free speech rights when he was demoted and transferred in retaliation for his disclosure to The Register. The trial court granted summary judgment for the defendants on both claims. The trial court reasoned that Connor and Spellman were immune from the suit under 42 U.S.C. § 1983 because Reich had not established violation of a clear right by Connor and

Spellman. The court also reasoned that Reich had failed to file a timely Notice of Claim within 120 days of the injury on the state action because the injury occurred with the January 31, 1991 letter of termination and Reich did not file a Notice of Claim until September 30, 1991-242 days later. Reich now appeals the trial court's granting of summary judgment on both claims.

I. Qualified Immunity

As a preliminary matter, summary judgment may not be granted where there is a genuine issue of material fact. ***Driver v. Driver***, 119 Wis.2d 65, 69, 349 N.W.2d 97, 100 (Ct. App. 1984). Reich directs our attention to several factual disputes. However, we deem none of these factual disputes material.

The issue of whether the defendants are entitled to qualified immunity is a question of law. ***Barnhill v. Board of Regents***, 166 Wis.2d 395, 406, 479 N.W.2d 917, 921 (1992). Therefore, we decide this issue without deference to the decision of the trial court. ***Id.***

Qualified immunity is an issue appropriately addressed and resolved at the summary judgment stage. ***Id.*** at 415, 479 N.W.2d at 925. Qualified immunity allows courts to quickly terminate insubstantial lawsuits, thus protecting public officials against the danger that the fear of being sued will hamper them in the proper discharge of their duties. ***Connor v. Reinhard***, 847 F.2d 384, 387 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988).

To carry out this goal of protecting public officials, the United States Supreme Court has articulated that qualified immunity protects public officials from suit if their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982); *see also* ***Barnhill***, 166 Wis.2d at 406, 479 N.W.2d at 921. Therefore, the defendants in the instant case are entitled to qualified immunity if they did not violate a clearly established constitutional right of Reich.

Additionally, Reich bears the burden of establishing the existence of the clearly established constitutional right. ***Barnhill***, 166 Wis.2d at 409, 479 N.W.2d at 922. The generality of the clearly established right must be specific enough so that a reasonable public official could have realized that his or her conduct was unlawful. Merely alleging a general violation of a constitutional right is insufficient to justify withholding qualified immunity. ***Id.*** at 408, 479 N.W.2d at 922. For example, claiming a public official's conduct violated a plaintiff's First Amendment right to free speech is too general. ***Id.*** On the other hand, this does not mean an official is protected unless the very action in question has been previously held unlawful. ***Anderson v. Creighton***, 483, U.S. 635, 640 (1987). Rather, there must be sufficiently analogous case law on the "clearly established right" to provide the public official with guidance on the lawfulness of the conduct in question.

Barnhill, 166 Wis.2d at 408, 479 N.W.2d at 922.

In the instant case, Reich argues that his right to be free from retaliation against his exercise of free speech was violated when the defendants transferred and demoted him from his previous job. it is clearly established that a public official may not retaliate against an employee on a basis that infringes the employee's constitutionally protected interest in freedom of speech. *Id.* at 409, 479 N.W.2d at 923. In order to determine whether the defendants violated this right, it is necessary to balance a public employer's interest in confidentiality or effective functioning of the employer's business against the employee's interest in free speech. *See id.* at 410, 479 N.W.2d at 923. If a defendant acts pursuant to a superior interest, then the defendant is entitled to qualified immunity. *Glass v. Dachel*, 2 F.3d 733, 745 (7th Cir. 1993).

In *Glass*, a sheriff's deputy reported to a fellow deputy that he believed his immediate supervisor had stolen a lawn mower from the department. The deputy was later given a letter of reprimand by the sheriff. The sheriff contended that he felt that the deputy's comments to the fellow officer should have been taken elsewhere in order to maintain the harmony and morale within the sheriff's department. *Id.* at 736-37. The court held that the sheriff was entitled to qualified immunity if he could prove that this was the reason he reprimanded the deputy because the law was clearly

established that a defendant does not violate the First Amendment if the defendant is acting pursuant to a superior interest. *Id.* at 745. As an example of a superior interest, the court gave the effective and efficient operation of a sheriff's department. *Id.*

> Other factors which are used to determine a superior interest are:
>
> (1) the need to maintain discipline or harmony among co-workers;
> (2) the need for confidentiality;
> (3) the manner, time, and place of the employee's speech;
> (4) the need to curtail conduct which impedes the employee's proper and competent performance of his [or her] daily duties;
> (5) the need to encourage a close and personal relationship between the employee and his [or her] superiors, where the relationship calls for loyalty and confidence; and
> (6) the context in which the speech occurred.

Barnhill, 166 Wis.2d at 411, 479 N.W.2d at 923. Our supreme court has recognized than and employer's interest in confidentiality and discipline can outweigh and employee's interest in free speech. *See id.* at 400, 479 N.W.2d at 919.

In *Barnhill*, the plaintiff worked for

the University of Wisconsin's Survey Research Laboratory (WSRL). He refused an assignment asking shoppers at malls whether they would be deterred from coming if protests were staged there. The plaintiff believed that it was inappropriate for WSRL to perform the shopping survey. He later leaked the survey questions to a newspaper and was fired for breaching WSRL's confidentiality. *Id.* at 403-05, 479 N.W.2d at 919-21. The plaintiff then sued his superiors at WSRL, claiming that his First Amendment right to free speech had been violated. *Id.* at 405, 479 N.W.2d at 921. *Barnhill* held that the defendants were entitled to qualified immunity. *Id.* at 414, 479 N.W.2d at 925.

The court reasoned that WSRL had a strong interest in maintaining the confidentiality of survey questions because confidentiality of survey questions was necessary to assure valid research results and to protect WSRL's reputation. *Id.* at 411, 479 N.W.2d at 923. A reputation for disclosing survey questions before the survey was finished would have had a substantial negative impact on the business of WSRL. *Id.* WSRL also had an interest in disciplining Barnhill to deter other employees from violating the confidentiality rules in the future. *Id.* at 411-12, 479 N.W.2d at 923. Therefore, the court stated that a reasonable public official could have concluded that the plaintiff's breach of confidentiality was sufficient to permit his discharge, *id.* at 412, 479 N.W.2d at 924, because it was not clearly established in 1985 that the plaintiff's

free speech interest outweighed the defendant's interest in confidentiality and discipline. ***Id.*** at 414, 479 N.W.2d at 925.

Turning to the instant case, the defendants are entitled to qualified immunity if they can show that they were acting pursuant to a superior interest. They argue that they had a superior interest in deterring other employees from attempting Reich's tactics. We are satisfied that the defendants' need for confidentiality, the need to encourage a close and personal relationship between Reich and his superiors, and the time, place and manner of Reich's speech weigh against Reich's interest in free speech. Therefore, we hold that the defendants are entitled to qualified immunity because the law in 1991 was not clearly established that Reich's interests outweighed those of the defendants.

As in ***Barnhill***, Reich violated his employer's interest in confidentiality. In ***Barnhill***, the employee signed a pledge of confidentiality. ***Id.*** at 403, 479 N.W.2d at 920. Similarly, Spellman specifically advised Reich not to tell The Register that it was losing the printing contract because of its failure to donate money to Spellman's fund-raising campaign. However, like the employee in ***Barnhill***, Reich divulged confidential information anyway. Reich deliberately undermined any future working relationship that his superiors may have had with The Register by disclosing confidential information. This factor weighs against Reich's free speech interest.

Additionally, Reich's disclosure to The Register damaged any close and personal working relationship that he may have had with Spellman. After discovering Reich's disclosure, Spellman no longer confided in Reich. Reich and Spellman also avoided each other more often than before the disclosure. Spellman believed that the situation between the two had a negative impact upon the office staff. Therefore, after all this, it would be difficult for Spellman and Reich to have a close and personal working relationship.

The time, place and manner of Reich's speech also weighs against him. Reich could only say that he believed Spellman's act of conditioning business upon donations to be morally incorrect. He was unsure of whether any laws had been broken. However, he did not confront Spellman or Connor with his views, nor did he contact the district attorney or other law enforcement authorities. Instead, he chose to unilaterally disclose confidential information to a client of the foundation. Following this unilateral disclosure of confidential information, Spellman could hardly count on Reich to abide by and carry out his orders.

Weighing these three factors against Reich's free speech interest, we recognize that a reasonable public official could believe that Reich's breach of confidentiality, disruption of a close and personal working relationship, and time, place and manner of speech were sufficient to permit his reprimand. Therefore, we hold that Connor and Spellman are entitled to qualified immunity.

Finally, we are not insensitive to the argument that the employer's interest in confidentiality and a close and personal working relationship could swallow up the employee's free speech interest. Whistleblowers would not be protected if an employer's interest automatically outweighed an employee's free speech interest anytime the employee disclosed confidential information. This would be true because, by their very nature, whistleblowers expose information to the public that the employer wants kept secret.

However, this is not our holding here. In the instant case, Reich does not assert that he believed any laws were broken by the defendants. He only states that he found their bidding practices immoral. This is similar to ***Barnhill*** where the employee found WSRL's behavior immoral. As in that case, the employee's free speech interest has less weight. An employee's interest in free speech is greater when illegal conduct is exposed. In such a situation, the employee's free speech interest may outweigh the employer's interest in confidentiality or a close and personal working relationship. ***Cf. Giacalone v. Abrams*** 850 F.2d 79, 87 (2d Cir. 1988) (noting that a plaintiff's First Amendment interest in expressing ethical concerns is of less magnitude than allegations of a cover-up). Therefore, in the instant case, we affirm the trial court on the 42 U.S.C. § 1983 claim.

II. Notice of Claim

Since there is no factual issue presented for determination on this issue, the only question is one of law concerning whether Reich complied with the notice of claim statute § 893.82(2), STATS., before filing his state action under §895.65, STATS. ***See Sambs v. Nowak***, 47 Wis.2d 158, 164, 177 N.W.2d 144, 147 (1970). Section 893.82(3) states in part:

> Except as provided in sub.(5m), no civil action ... may be brought against any state office, employe or agent ... unless within 120 days of the event causing injury ... giving rise to the civil action ... the claimant in the action ... serves upon the attorney general written notice of a claim ....

Additionally, § 893.82(2m) states that "[n]o claimant may bring an action against a state officer, employe or agent unless the claimant complies strictly with the requirements of this section."

The issue in dispute here is whether the event causing Reich's injury was the January 31, 1991 termination letter, or whether it was his transfer and demotion at the end of June 1991. If the event causing the injury was the January termination letter, then Reich's state claim must be dismissed because he did not file a Notice of Claim until September 30, 1991--242 days after the event. However, if the event causing the injury was the June transfer and demotion, then the trial

court must be reversed because Reich would have filed his Notice of Claim within the 120-day period following the event.

The issue concerns when Connor and Spellman retaliated against Reich for his exercise of free speech. In ***Jicha v. DIHLR***, 169 Wis.2d 284, 485 N.W.2d 256 (1992), Jicha was terminated form his job for absenteeism. ***Id.*** at 288, 485 N.W.2d at 257. Jicha's employer had an appeals process in which his termination could be overturned by the company president. ***Id.*** at 288-89, 485 N.W.2d at 258. Jicha appealed his termination to the company president. However, the president refused to reinstate him. ***Id.*** Jicha then claimed that his employer violated the Wisconsin Family and Medical Leave Act (FMLA) in firing him. ***Id.*** at 289, 485 N.W.2d at 258. A complaint alleging violation of FMLA must be filed within thirty days of the violation. Section 103.10(12)(b), STATS. Jicha filed his complaint less than thirty days after the company president refused to reinstate him but more than thirty days after he had received the initial notice of his termination. ***Jicha***, 169 Wis.2d at 289, 485 N.W.2d at 258.

Jicha argued that the thirty-day statute of limitations did not begin to run until he received his denial of reinstatement from his appeal. ***Id.*** at 293, 485 N.W.2d at 260. Our supreme court held that the thirty days began running when the plaintiff received his initial notice of termination. ***Id.*** at 297, 485 N.W.2d at 261. The court agreed that the issue in the case was when the plaintiff reasonably knew of the FMLA violation, not

whether he reasonably thought he would be reinstated. *Id.* at 296, 485 N.W.2d at 261. The court stated that the plaintiff reasonably should have known that a violation occurred upon receipt of his initial termination letter. *Id.*

We conclude that the reasoning of *Jicha* disposes of this case in favor of the defendants. As in that case, Reich reasonably should have known that the defendants may have been retaliating against him for his exercise of free speech when he received the January 31, 1991 letter of termination. In fact, Reich was aware of the alleged retaliation. Reich's attorney sent Connor a letter in May of 1991, stating that if the university should follow through with its termination of Reich, then Reich's right to free speech under §895.65, STATS., would be violated. Moreover, there is no allegation or evidence that the defendants had withdrawn the January termination letter. Therefore Reich knew that he was to be terminated on June 31[sic]. The possibility that Reich would only be transferred and demoted did not change this fact. Therefore, the June transfer and demotion did not change when the event causing the injury occurred. The transfer and demotion only changed the degree of injury. We hold the Reich did not comply with the 120-day notice of claim because the event causing the alleged violation of §895.65 was the January 31, 1991 letter of

termination.[2]

For the above reasons, we affirm the trial court on both issues.

By the court.--Judgment affirmed.

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[2] The parties have not briefed and we express not opinion on whether "qualified immunity" is available in an action brought pursuant to § 895.65, STATS.

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You are hereby notified that the court has entered the following order:

No. 93-1989 Reich v. Spellman, et at.
L.C.#91CV747

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant-petitioner Dale E. Reich, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Abrahamson, J., did not participate.

Marilyn L. Graves
Clerk of the Supreme Court

STATE OF WISCONSIN WALWORTH COUNTY
CIRCUIT COURT BRANCH III:

DALE E. REICH,

Plaintiff,

vs. Case No. 91-CV-747

MICHAEL SPELLMAN,
JAMES R. CONNOR and
BOARD OF REGENTS,

Defendants.

MEMORANDUM DECISION ON
DEFENDANT STATE OF WISCONSIN'S
MOTION FOR SUMMARY JUDGMENT

I

PROCEEDINGS TO DATE

The plaintiff, Dale E. Reich, began this action against the University of Wisconsin-Whitewater, Assistant Chancellor Michael Spellman, former Chancellor James R. Connor, and the Board of Regents on December 9, 1991. Plaintiff alleged a 42 U.S.C. §1983 violation alleging the defendants abridged his freedom of speech (First Amendment rights) by state action.

Plaintiff alleged also the State, through its Board of Regents, retaliated against the plaintiff for disclosing to the Whitewater Register which had been supplying printing services to the University for failure to make an adequate contribution to the University's fund drive.

The defendants answered denying the

allegations of the complaint and alleging the affirmative of failure of proper notice under §893.82, Wis. Stats., and also alleging the defendants have qualified immunity, immunity on the grounds the acts alleged were discretionary and alleging sovereign immunity.

The defendants moved to dismiss the §895.65 action for failure to allege notice. This court dismissed plaintiff's complaint but allowed plaintiff to replead. Plaintiff repleaded. Defendants moved for summary judgment. On February 8, 1993, the matter was argued and a briefing schedule set up. It is now ready for decision.

II
APPEARANCES

Plaintiff appeared by Soffa & Devitt, by Attorney Russell W. Devitt and Attorney David Honan, Whitewater, Wisconsin.

Defendants appeared by the Wisconsin Department of Justice, James E. Doyle, by Assistant Attorney General, Michael J. Losse, Madison, Wisconsin.

III
A
AS TO QUALIFIED IMMUNITY

The operative federal statute section is 42 U.S.C. §1983:

> A. Definition
> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the

> District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The jurisdiction of this court to hear 42 U.S.C. §1983 cases was determined in Terry v. Kolski, 78 Wis. 2d 475 (1976 Sup. Ct.) thus:

> The county court in which this action was brought was an appropriate forum. As was conceded by Milwaukee county's corporation counsel, and as we have demonstrated from analysis of the relevant federal statutes, the circuit courts of Wisconsin, as courts of general jurisdiction, may entertain sec. 1983 actions. The Constitution of the State of Wisconsin, Art. VII, sec. 8, provides:
>
> "The circuit courts shall have original jurisdiction in all matters civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law...."

The defendants moved for summary judgment citing qualified immunity under

Rule §802.08(2).

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> - - - - -
>
> (3) Supporting papers. Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so

> respond, summary judgment, if appropriate, shall be entered against such party.

This court's methodology in reviewing the defendants' motion for summary judgment as set forth above and in the cases is thus:

> Wright v. Hasley, 86 Wis. 2d 572 (Sup. Ct. 1978).
>
> We approve the trial court's conclusion that a material issue of fact remains...and (plaintiff) was entitled to a trial. Under such circumstances summary judgment is appropriate, and the plaintiff should be granted a trial on the merits.
>
> Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349 (1980).
>
> The summary judgment procedure does not function as a substitute for a trial of any genuine issue of material fact, but permits a decision based on affidavits, records and for depositions. (Cits. omitted)
>
> The party moving for summary judgment must demonstrate that a trial is not necessary and establish a record sufficient to demonstrate to the satisfaction of the court that there is no triable issue of material fact on any issue presented. (Cit.

omitted)

> Any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the moving party, (Cits. omitted)
>
> If the trial court has determined the movant has proved to the court's satisfaction that there is no genuine issue of material fact as a matter of law, then the trial court should enter judgment.

There is no lack of controversy as to the facts and the parties motivations. To muddy the waters further, this court blundered when it asked the parties what the status of the University of Wisconsin-Whitewater Foundation was and its role here. The response was a substantial amount of exhibits which seem to indicate that the University of Wisconsin-Whitewater Foundation is a not-for-profit non-stock corporation which is not relevant here as the private corporation is not being sued nor could it be in the context of a §1983 action. The court need not and does not decide that issue here.

Again there is no lack of controversy as to the facts. As part of plaintiff's second affidavit, a newspaper article was annexed. This article was published April 22, 1991, in the Janesville Gazette [a daily newspaper of general circulation in Whitewater, Wisconsin]. I quote from it not as a source of evidentiary facts but rather to flesh out and frame some of the

issues that would be developed at trial:

> Paper refuses to donate, loses contract: Ex-employee
>
> MADISON - A former UW-Whitewater employee claims the school transferred a contract from the Whitewater Register because the firm did not contribute enough to a university building fund.
>
> Dale Reich, former news and publications director for the university, has filed a claim with the state attorney general's office alleging retaliation when he informed the newspaper of the school's decision.
>
> Reich claims he was demoted and his pay cut by $14,000 a year as a result of the incident.
>
> Reich's claim alleges that Assistant Chancellor Michael Spellman announced in the fall of 1990 that the Register would not be awarded the printing contract.
>
> Reich claims that was "because the principals of the Whitewater Register did not make what Spellman felt to be a sufficiently generous contribution for the new multi-purpose auditorium."
>
> When Tom Coe, register editor

and publisher, asked why the university transferred the contract, Reich told him about Spellman's comments regarding contributions to the auditorium project, according to the claim.

Spellman admonished him for a "breach of management confidence," Reich said.

Coe would not comment on Reich's claim.

"I assume this will end up in court, so I don't think I should make any statements," he said.

Spellman would not comment directly on Reich's claim that he cut off the Register from the university contract because the newspaper rejected a request for a contribution.

The rejection "was not the primary factor" in transferring the printing contract, Spellman said. "There was a problem with the Whitewater Register in the printing of the summer issue of the UW-Whitewater Today, a campus publication funded by the UW-Whitewater Foundation. A decision was made to transfer the printing contract to another vendor.

"In the months that followed, efforts were made to explain this action to the owners of the

> Whitewater Register and since that time the issue has been fully resolved with them," Spellman said.

This could then readily become a three-way issue and a jury would be called upon to sort these claims out.

One must be careful not to lose sight of the issues presented for this motion, however. The plaintiff in his affidavit of October 29, 1992, states:

> 12. It should be noted that while I was unhappy with the quality of printing which the Whitewater Register was doing on "Whitewater Today," it was not the reason why they lost their right to bid and receive a contract. The reason was Mr. Spellman's order to me that the Register be excluded from the chance to obtain further printing business from the University in light of their unwillingness to give sufficiently to the auditorium campaign.

In Barnhill v. Board of Regents, 166 Wis. 2d 395 (Sup. Ct. 1992), the Wisconsin Supreme Court stated at page 406:

> 1. QUALIFIED IMMUNITY
>
> The issue of qualified immunity is a question of law that is to be decided by the court, not the jury. Rakovich v. Wade, 850 F.

2d 1180, 1201 (7th Cir. 1988).

- - - - -

> Qualified immunity is intended to protect public officials from harassing litigation so that they "reasonably can anticipate when their conduct may give rise to liability for damages." Davis v. Scherer, 468 U.S. 183, 195 (1984). More specifically, qualified immunity protects government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have know. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

At page 408:

> From Anderson, we glean several guidelines concerning the level of generality afforded to "clearly established law" in the qualified immunity determination. Merely alleging a general violation of a right that may be clearly established by the constitution or a statute is insufficient clarity of established law to justify withholding qualified immunity. For example, an allegation that an action violates one's freedom of speech protected under the First Amendment is too general

> to strip a public official of qualified immunity. On the other hand, the "clearly established law" does not have to specifically correspond with every facet of the present situation. Rather, the "clearly established law" must be sufficiently analogous to the provide the public official with guidance as to the lawfulness of his or her conduct.

At page 409:

> Whether a public official may be protected by qualified immunity turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time the action was taken. Harlow, 457 U.S. at 818-19. If the law was not clearly established on the subject of the action when it occurred, then the public official cannot be held to know or anticipate that the conduct was unlawful. On the other hand, if the law was clearly established, then the immunity defense should fail because a reasonably competent public official should have know that the conduct was or was not lawful. (Emphasis added)
>
> The plaintiff bears the burden of establishing the existence of the allegedly "clearly

> established" constitutional right. (Cits. omitted)

That public employees have constitutional rights in the area of speech was clearly delineated in Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731:

> In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

We are also taught the rights are not absolute, thus from Note 3 in Pickering:

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate

> no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.

This the is Wisconsin Supreme Court in Barnhill (Op. cit.) at pages 410-411 held:

> Pickering and the aforementioned cases suggest that certain factors may be sufficient to limit what a public employee may publicly disclose. These factors include:
>
> (1) the need to maintain discipline or harmony among co-workers;
> (2) the need for confidentiality;
> (3) the manner, time, and place of the employee's speech;
> (4) the need to curtail conduct which impedes the employee's proper and competent performance of his daily duties;
> (5) the need to encourage a close and personal relationship between the employee and his superiors, where the relationship calls for loyalty and confidence; and
> (6) the context in which the speech occurred.

The plaintiff then argues in the balancing test this court is to perform

that (from page 42 of plaintiff's brief of October 29, 1992):

> In the present case, the clear, prevailing, and overriding public policy interest associated with information proffered by Mr. Reich is to ensure that a fair and equitable bidding process occurs when the University of Wisconsin personnel are involved in the decision making process, and to avoid the taint or appearance of impropriety by such personnel or the University. Additionally, since the taxpayers of Wisconsin subsidize the operation of the Whitewater Foundation [see Argument II(A)(2)], Mr. Reich's speech served an important public interest in ensuing that the least costly bidder be awarded the printing contract. As a secondary matter, in the present case, Mr. Reich's actions also directly served the interests of The Register and the contributors to the Foundation, all of whom are members of the general public, by promoting compliance with a bidding system designed to provide for reasonable printing costs and equal opportunity to bidders.

The defendants argue, however (pages 33-34, defendants' brief of September 28, 1992):

"Barnhill could have expressed his concerns without deliberately trying to damage and impair the operations, reputation, and business of WSRL." (Quoting Barnhill)

So it was with Reich. Once arrogating to himself the right to make a moral judgment for the entire university, he didn't just complain about it, he ventured into a course of conduct to obstruct it - even though Reich admits he couldn't find anything unlawful in the alleged practice.

Just as Barnhill went beyond legitimately exercising his rights when he tried to obstruct the defendants from exercising their rights, so Reich also went too far when he set about to so embarrass and humiliate Spellman in front of an important client, without warning, so that there would be no more of what Reich objected to. The right to criticize is not the right to sabotage.

Chancellor Connor had the right to include in the job description for the Assistant Chancellor for Public Relations substantial fund raising through the auspices of the alumni Foundation, to supplement sky-rocketing costs and dwindling appropriations by the

> legislature. Spellman had the right to solicit contributions. The alumni Foundation, a private non-profit corporation, had the right to condition its business, including the printing job in question, upon receiving a substantial contributions [sic] from those who sought its business. Reich may have had limited right to object to the university's involvement in this, but he had no right to covertly sabotage the system his superiors had set up.

As the Attorney General argued at the oral arguments, immunity is the rule, the plaintiff has the burden to show clearly a similar right. Further facts may be determined at a summary judgement motion which may be dispositive of the case and finally the doctrine of qualified immunity may well "protect the guilty".

The court finds then considering the factors set forth in Pickering: (1) The plaintiff has established no clear right; and (2) considering the employer's needs, the ambiguous nature of the employer's acts, the need for confidentiality when dealing with a supplier, the need for loyalty and confidence, the court finds for the defendants and grants their motion.

II

NOTICE

B

The defendants move for summary judgment, the claim brought under §895.65, Wis. Stats., for failure to timely file a

notice.

> §893.82(3) Except as provided in sub. (5m), no civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties...unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved. A specific denial by the attorney general is not a condition precedent to bringing the civil action or civil proceedings.

In light of Daily v. University of Wisconsin-Whitewater, 145 Wis. 2d 756 (Ct. App. 1988), the defendants cite also as operative the following, effective August 15, 1991, 1991 Act 39 §3579-3582:

> (2m) No claimant may bring an action against a state officer, employe or agent unless the

> claimant complies strictly with the requirements of this section.

It is not argued that notice need not be given within 120 days of the injury under §895.65. The issue as framed is, when did the injury occur?

The time frame is set forth in plaintiff's brief of October 29, 1992, thus:

> Dale Reich, the plaintiff, became Director of News and Publications at the University of Wisconsin-Whitewater in July, 1978. Mr. Reich served in this position for approximately eleven years.
>
> - - - - -
>
> In 1988 or 1989, when Ms. Wolt (Assistant Chancellor Wolt was plaintiff's immediate supervisor) resigned, Mr. Reich, upon the request of Chancellor Connor, assumed the position of Acting Assistant Chancellor of University Relations.
>
> - - - - -
>
> While serving in this limited appointment, Mr. Reich maintained a concurrent statutes as Academic Staff. Exhibit B. Under the §3.05 of the University's Academic Staff Personnel Policies and Procedures ("University Handbook"; Exhibit C), Mr. Reich's "limited appointment," meant that Mr. Reich served at

the pleasure of the official who made the appointment, in this case defendant and then-Chancellor James R. Connor.

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During the years 1990 and 1991, Assistant Chancellor Spellman and his office were engaged in fund raising efforts to fund a multi-purpose auditorium on the campus of the University of Wisconsin-Whitewater. During the course of these efforts, Mr. Spellman directed that The Whitewater Register (hereafter, "The Register"), a newspaper publication enterprise in the City of Whitewater, would be penalized with loss of University business because they did not make what Assistant Chancellor Spellman considered to be an "adequate" contribution to the fund raising campaign he was conducting. The Register was subsequently denied the opportunity to bid for the printing rights to the Whitewater Today, a paper funded by the University of Wisconsin-Whitewater Foundation (hereafter, "Whitewater Foundation") and produced by the News and Publications Department. Mr. Spellman contacted Mr. Reich, informed him of his directive that The Register would be penalized for failure to make an adequate contribution, and told the plaintiff that, if asked by any

one from The Register, he should tell them that the denial of the opportunity to bid was based solely on the poor quality of work that The Register had done in the past.

Mr. Reich was eventually asked by The Register why they were not allowed to bid, and he replied truthfully - that they had not, in Mr. Spellman's view, contributed enough to the auditorium project. Because he disclosed this information, Mr. Reich was reprimanded by Assistant Chancellor Spellman. Mr. Reich consequently met with Assistant Chancellor Spellman's supervisor, then-Chancellor Connor, who advised him that, regardless of his feelings about the propriety of Assistant Chancellor Spellman's actions, nonetheless, the plaintiff would be required to follow and obey the directions of Assistant Chancellor Spellman.

Feeling that, under the circumstances, he could no longer continue to work under the supervision of Assistant Chancellor Spellman, Mr. Reich attempted to resign his employment from the University. He was however persuaded at the time by then-Chancellor Connor to allow the Chancellor to secure alternative employment for him within the University.

> But instead of securing alternative employment, in January of 1991, Mr. Reich was told by Chancellor Connor that he would no longer be working for the University as of June 30, 1991. Then, in January of 1991, Assistant Chancellor Spellman reassigned Plaintiff to another office where he had substantially lesser job responsibilities than he had previously been responsible for. When Mr. Reich did not voluntarily leave the University on June 30, 1991, he was arbitrarily transferred from his job as Director of News and Publications Services to another department at the University at a substantially reduced salary and with substantially different job training requirements and responsibilities than he has as Director of News and Publications.

The plaintiff then argues compliance with §893.82(3) thus:

> Plaintiff complied with §893.82(3) when he filed his Notice of Claim on September 30, 1991, exactly sixty days after the event causing the injury, namely Mr. Reich's transfer, demotion, and reduction in pay. Further notice of claim was provided prior to the plaintiff's last day of work; accordingly, the requirements of

893.82(1) that the Attorney General have adequate time to investigate the claim and to provide the opportunity to the Attorney General to reach a compromise prior to a civil action were comported with. Additionally, Mr. Reich and his attorney corresponded and conversed on a number of occasions with the Chancellor of the University of Wisconsin System between January 31 and prior to July 2, 1991. Some of these discussion included the general counsel for the University of Wisconsin System. Following July 2, 1991, plaintiff and his attorney met to discuss possible alternative resolutions to the damages with the acting Chancellor and the general counsel.

The plaintiff received the following letter on University of Wisconsin-Whitewater letterhead dated January 31, 1991, from Chancellor James R. Connor:

Dear Dale:

At the time I received your letter of November 19, 1990 indicating your intention to resign from the University of Wisconsin-Whitewater on January 31, 1991, I stated that I thought you had acted in anger and haste and that you should allow me to try to find you another assignment at the

> University. I, therefore, took no action on your resignation at that time.
>
> As you now know, I have been unsuccessful in identifying a new assignment for you. . .
>
> It is, therefore, with great regret that I accept your resignation from the University of Wisconsin-Whitewater. It would seem appropriate for you to remain on the academic staff until June 30, 1991 instead of leaving the University on January 31st. This will give you the opportunity to seek alternative employment and also will give me added time to see whether there is an assignment here which would be attractive enough for you to continue here. As you know, I will also be leaving on June 30, and I do not think it fair to pass the problem of your job responsibilities to my successor. If you are agreeable to this extension of your resignation date, please let me know.

Defendants cite as a similar case Jicha v. DILHR, 169 Wis. 2d 284 (Sup. Ct. 1992):

> We now turn to the primary issue before us: whether Jicha failed to timely file his complaint alleging a violation of the

FMLA. The statute of limitations provision, sec. 103.10(12)(b), Stats., provides:

> An employe who believes his or her employer has violated sub. (11)(a) or (b) may, within 30 days after the violations occurs or the employe should reasonably have known that the violation occurred, whichever is later, file a complaint with the department alleging the violation.

Jicha sets forth two arguments to support his contention that the 30-day statute of limitations began to run on December 15, 1988, the day he received the letter refusing reinstatement. First, Jicha argues that Fort Howard's October 24 termination letter did not violate the FMLA because Fort Howard did not have sufficient notice of his medical condition at that time. Jicha posits that the violation did not occur until Fort Howard refused to reconsider its position after learning on Nov. 1, 1988, of the medical facts and circumstances surrounding Jicha's absence. We do not agree.

Generally, Wisconsin statutes of limitation employ language to the effect that a claim must be filed within a certain number of days or years after the cause of action accrues.

- - - - -

Our case law indicates that " 'a cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it.' ". (Cits. omitted) In other words, a cause of action has accrued when all of the elements necessary to bring a cause of action have occurred.

- - - - -

Its existence (post-termination appeal process) did not change the fact that Jicha's employment was terminated on October 24, 1988, and it was not reasonable for Jicha to conclude otherwise. As the court of appeals reasoned:

> The questions . . . [in this case] concerns when Jicha reasonably knew of a violation, not whether he reasonably thought he would be reinstated. The violation occurred upon termination without regard to whether he was

> reinstated. The availability of the Open Door Policy procedure does not alter the fact that Jicha was discharged. The policy allows for presidential review 'after the discharge is effective.' The president may reinstate the employee if he believes the discharge was too severe. However, if the president agrees with the discharge decision, 'the employee remains discharged.' While the policy refers once to 'the period of suspension,' when read as a whole, the policy is intended as a post-termination procedure that occurs after the discharge is effective. Jicha, 164 Wis. 2d at 101 (emphasis in original).

We agree with this analysis. It was not reasonable for Jicha to conclude that Fort Howard's policy was anything other than an appeal process following a discharge. It also was not reasonable for him to believe that a violation of the FMLA did

> not occur until after the post-termination procedure. Jicha reasonably should have known that a violation occurred upon receipt of his termination letter on October 27, 1988.

Defendants then argue in their brief of October 29, 1992:

> Plaintiff Reich had an enforceable cause of action against known defendants as of January 31, 1991. He could have brought an action for injunctive or declaratory relief regarding his alleged involuntary termination immediately, with money damages for emotional distress, and compensatory damages as they accrued.

While plaintiff argues he was negotiating and discussing this matter with the University officials, it is my opinion that the triggering dated is January 31, 1991; and, therefore, no timely notice was given.

Defendants' motion for summary judgment is granted with costs.

Dated at Elkhorn, Wisconsin, this 28th day of April, 1993.

BY THE COURT:

/s/

John R. Race
Circuit Court

JRR:jas
cc: Atty. Russell W. Devitt
Asst. Atty. Gen. Michael J. Losse

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

DALE E. REICH,

Plaintiff,

vs.

AFFIDAVIT OF DALE E. REICH

MICHAEL SPELLMAN,
Assistant Chancellor,
University Relations,
University of Wisconsin-Whitewater,

Defendant,

Case No. 91 CV 747

JAMES R. CONNOR,
former Chancellor,
University of Wisconsin-Whitewater,

Defendant,

BOARD OF REGENTS of the University of Wisconsin System,

Defendant.

STATE OF WISCONSIN)
)SS
COUNTY OF WALWORTH)

Dale E. Reich being first duly sworn, deposes and says:

1. I served as Director of News and Publications Services at the University of Wisconsin-Whitewater for 13 years, from July 1, 1978 until July 1, 1991. During that time, I helped to develop and define

the mission of that unit. The primary mission of the unit was to serve as a liaison between the University and its various publics, including students, parents, alumni, University employees, the media, and others. An emphasis in the News and Publications Services mission statement, written by me and approved by Mr. Spellman, included honest and open communication with the members of the press.

2. My responsibility as Director of News and Publications Services was to lead my unit toward the successful completion of its mission statement (within all legal and ethical parameters). I functioned with great autonomy as Director of News and Publications Services during my tenure, including those years served under Mr. Spellman. This autonomy can be confirmed by other employees in the Office of News and Publications. It was my understanding that one of the major responsibilities of the position of Assistant Chancellor for University Relations, to which Chancellor Connor appointed me upon the resignation and departure of Mrs. Kay Woit, was to complete the fundraising for the proposed auditorium. At the time of my appointment, the University was approximately $200,000 short of its goal. I pursued that duty enthusiastically. However, when the Chancellor announced that state funding for the auditorium would fall short, and that another $3 million would be required, I withdrew my application for the permanent position within a week. I did not want to be employed in a position which the University was clearly defining almost

exclusively in fundraising terms. After Mr. Spellman arrived I returned to my permanent position as Director of News and Publications Services, as Chancellor Connor and I had agreed upon prior to my appointment as Acting Assistant Chancellor for University Relations.

3. The Assistant Chancellor for University Relations at University of Wisconsin-Whitewater also serves concurrently as the Executive Director of the University of Wisconsin-Whitewater Foundation.

4. During my years as Director of News and Publications Services I received annual raises and contract renewals. Many of my raises were large when compared to other academic staff at University of Wisconsin-Whitewater. During one of those years, when one-time funding became available, academic staff were invited to apply for raises in the amount of their choice. I received a LARGER RAISE than the one which I requested. To my knowledge, I was the only one of the more than 40 academic staff applicants to receive a larger raise than the one which he or she requested.

5. During the year beginning July 1, 1989 and ending July 1, 1990, I received three writing awards at the annual Universitiy of Wisconsin System Communicators Meeting, which was held at the University of Wisconsin-Whitewater. In addition, my unit submitted a second place entry in the category for effectively promoting "Design for Diversity." I was also honored with an

Outstanding Citizen Award by the Fairfield Grange of rural Whitewater. In 1990, 1991, and 1992 I was selected to serve as the opening speaker for Badger Boys State in Ripon, WI. Since 1988 I have also been honored by the Whitewater Police Department and the Vietnam Veterans of America (state chapter). To the best of my knowledge, no other University of Wisconsin System employee received more awards in the annual University of Wisconsin System Communicators awards program since its inception in 1985. Furthermore, members of the University of Wisconsin System University Relations Office stated on more than one occasion that the Office of News and Publications Services at the University of Wisconsin-Whitewater was the best unit of its kind in the 26-campus University of Wisconsin System.

6. My service to the University of Wisconsin-Whitewater went well beyond my duties as Director of News and Publications Services. I was asked, and sometimes even volunteered, to teach courses in the Communication Department. On occasion, I even taught these courses without financial remuneration. The chair of the Department said that my student-teacher evaluations placed me in the top 15% of instructors in the department. I also taught Elderhostel in the summer of 1990, and received the highest student ratings among the three instructors, including the winner of the Roseman Excellence in Teaching Award, given annually to the best teaching faculty member at the University of Wisconsin-Whitewater.

7. To the best of my knowledge, I received absolutely no written negative comments from either Chancellor Connor or Assistant Chancellor Kay Woit during the first 11 years of my tenure as Director of News and Publications Services. Both indicated a high level of approval and appreciation for my efforts.

8. Mr. Spellman assigned me the task of writing his fundraising proposals but, immediately after I received that assignment, my assistant, Julie Darling, volunteered to try writing the proposals. She continued to write under the direct supervision of Mr. Spellman. My alleged refusal to write proposals resulted in no reprimand by Mr. Spellman, written or otherwise.

9. During the meeting with Chancellor Connor and Mr. Spellman which immediately preceded my written resignation from the University of Wisconsin-Whitewater (dated Nov. 19, 1990), Mr. Connor told me four times that Mr. Spellman was my supervisor and that I had to do what Mr. Spellman wanted me to do. It was an indication to me that my objection to Mr. Spellman's fundraising tactics were being dismissed. Under extreme stress, I submitted my letter of resignation a few days later. It was a protest against unethical fundraising tactics and Mr. Connor's apparent approval of Mr. Spellman's actions.

10. The position which I was forced to assume on July 1, 1991 in the Office of Continuing Education Services was quite dissimilar to the ones for which I had

submitted letters of application at earlier dates. The new position, as indicated in the published advertisement, emphasized data management. I was neither interested in such work nor prepared to assume such duties. As a result, I did not submit an application for that position.

11. My forced separation from the Office of News and Publications Services was an extremely difficult and emotional experience for me. I had served the University for nearly 20 years, beginning as a student editor. That loyalty continued when I graduated and became an editor at the Whitewater Register. I played a leading role in helping the University to save its graduate school in 1974. In fact, I was honored by the Wisconsin Newspaper Association that year for my efforts. I also graduated twice from the University of Wisconsin-Whitewater, served as an instructor in the Communications Department, received an Outstanding Young Alumnus Award from UW-Whitewater in 1977, and provided positive leadership on many fronts. Example: I was the only academic staff employee to serve on the committee which the Faculty Senate constituted in the mid-1980's to fight a zero percent pay increase. I was later honored by the Faculty Senate for my service. These years of loyal and dedicated service, spanning nearly one-half of my lifetime, came to an abrupt halt when I was separated from my position on June 30, 1991. In addition, the months preceding that separation were filled with intense emotional strain, brought on by Mr. Spellman's actions, including his

fundraising schemes and his attempts to manipulate and manage the news emanating from our campus. I sought help from the University of Wisconsin-Whitewater Health Center to combat my extreme emotional stress, and was advised by Dr. Lee Rexroat to see a counselor off-campus. He suggested Dr. Fred Gustafson, Watertown, whom I then saw over the course of several months. The strain brought on by my change of circumstances at the University of Wisconsin-Whitewater was extreme. I felt as though the University was purposely punishing and humiliating me in an effort to get me to resign. I suffered significant financial loss. I was certain that my career at the University of Wisconsin-Whitewater, as well as my career as a public information officer under any other circumstances, had been destroyed. Further, I felt the emotional stress of being demoted and punished for having done what was right and honest for the University, its students and alumni, parents, and the public at large. I became unable to complete a full work week in the Office of Continuing Education and Outreach without taking a sick day in the middle of each week to fight the overwhelming stress, and to go through a period of emotional recuperation.

12. It should be noted that while I was unhappy with the quality of printing which the Whitewater Register was doing on "Whitewater Today," it was not the reason why they lost their right to bid and receive a contract. The reason was Mr. Spellman's order to me that the Register be excluded from the chance to obtain further printing business from the

University in light of their unwillingness to give sufficiently to the auditorium campaign.

13. The defendants' claim that that "at least part of his motivation was to be disruptive by embarrassing his supervisor, Spellman" is NOT TRUE. I simply responded honestly to Mr. Coe's query with respect to the status of the printing contract for WHITEWATER TODAY. I went along with Mr. Spellman's unethical secret for many months, and I regret that. I was finally moved to depart from the conspiracy by the direct question of Mr. Coe. It was a spontaneous, unplanned action which I knew might put me at great jeopardy, but which I needed to do in order to separate myself from dishonest and unethical actions.

14. The defendant's claim that my case engendered virtually no interest among the media is also not true. The Janesville Gazette called me and asked for details, and then published a story on my case. A second story, which followed the filing of this suit, was not only carried by the Gazette but picked up for statewide distribution by the Associated Press. I continue to get queries from the press and from many individuals concerning the status of my lawsuit.

15. The defendants' statement that I admitted that office harmony was "shattered" is false. I said only that office morale had been negatively affected, not that it was "shattered." Further, I was referring to Mr. Spellman's actions as the cause of the decline in morale, not my own.

16. With regard to the abuse of trust and a higher duty of loyalty that the defendant alleges, my highest duty was to tell the truth, and to properly serve the citizens of the State of Wisconsin. It was Mr. Spellman who was abusing the high level of trust placed in him.

Dated this 29th day of October, 1992.

/s/_____
Dale E. Reich

Subscribed and sworn to before me
this 29th day of October, 1992.

/s/_____
David P. Honan, Notary Public
Walworth County, Wisconsin

My commission is permanent.

STATE OF WISCONSIN CIRCUIT COURT
WALWORTH COUNTY CASE NO. 91 CV 747

DALE E. REICH,

Plaintiff,

vs.

MICHAEL SPELLMAN, Assistant Chancellor, University Relations, University of Wisconsin-Whitewater,

Defendant,

JAMES R. CONNOR, former Chancellor, University of Wisconsin-Whitewater,

Defendant,

BOARD OF REGENTS of the University of Wisconsin System,

Defendant.

SECOND AFFIDAVIT OF DALE E. REICH

[FILE STAMPED DEC. 22, 1993]

STATE OF WISCONSIN)
)SS
COUNTY OF WALWORTH)

Dale E. Reich being first duly sworn, deposes and says as follows:

1. I am the plaintiff in the above and foregoing action and make this affidavit for the purpose of establishing certain facts and in opposition to defendants' motion for summary judgment.

2. For many years I had been the Director of News and Publications for the University of Wisconsin-Whitewater; in the course of that occupation in 1990 and while in the course of fundraising

activities to fund the proposed new Whitewater Multi-Purpose Auditorium Project, Assistant Chancellor Spellman told me that The Whitewater Register (hereafter, The Register), a local newspaper and publishing business in the City of Whitewater, who had regularly printed the "Whitewater Today" publication, would not be allowed to bid on the upcoming issue of "Whitewater Today" because the owners of The Register made what Assistant Chancellor Spellman felt was an inadequate contribution to the auditorium fundraising project; Mr. Spellman indicated to me that if I was asked why The Register should not be allowed to bid that I should respond that the reason was because of poor printing quality in a prior issue of "Whitewater Today" but that I should not indicate that it was because he felt the owners of The Register had made an inadequate contribution to the fundraising campaign.

3. In the fall of 1990 a representative of The Register called me at the University and asked why they had not been given the opportunity to bid on the "Whitewater Today" above referred to. At first I indicated that the reason was poor printing quality as directed by Mr. Spellman. I then, after discontinuing my conversation with the representative of The Register, called the representative back on telephone and told him that in truth the reason they were not allowed to bid was because they had made an inadequate contribution to the fundraising project for the new projected multi-use auditorium; soon there after a meeting was held between Mr. Spellman and the owner of The Register and following that I was reprimanded by Mr. Spellman first orally and then in writing for having disclosed to The Register the truthful reason why they were not allowed to bid on the "Whitewater Today" issue.

4. While I agreed with Mr. Spellman that the printing quality of the prior issue of the "Whitewater Today" was not satisfactory and that such unsatisfactory printing quality would have been a legitimate reason to change printers, I

strongly disagreed that business should be taken away from The Register because of an inadequate contribution to the University fundraising campaign; regrettably I went along with Chancellor Spellman until I was confronted by The Register and then was compelled by my own feelings to disclose to The Register, when asked, the real reason why it had not been allowed to bid.

5. After being reprimanded by Mr. Spellman I met with Mr. Spellman and his supervisor, then Chancellor James Connor, who advised me that, regardless of my feelings about the propriety of Mr. Spellman's actions, I would nevertheless be required to follow and obey the directions of Mr. Spellman.

6. I felt and believed at that time that Mr. Spellman's actions and fundraising techniques represented an ethical breach and mismanagement and an abuse of authority, could possibly result in a substantial waste of public money, and were coercive and may have constituted extortion:

a. I recalled that on at least one occasion when then-Chancellor Connor, prior to Mr. Spellman's directive to me to not disclose the real reason for The Register failing to be allowed to bid, had indicated that no coercion should be used to solicit contributions to the Campaign and then if someone failed to give, nothing further should be said or done;

b. I was and am concerned that Mr. Spellman's actions might have constituted extortion because it appeared to me to be a deliberate attempt to force The Register to reconsider its contribution if it wanted to continue to receive consideration in the bidding process, and it bothered me and does bother me that Mr. Spellman's actions meant that if The Register had given an adequate contribution, then the printing quality problems, which was ostensively the reason for their loss of business, would not have mattered;

d. I believed that his policy was

also probably contrary to state printing regulations, which allows all qualified printers to submit bids on specific contracts (The Register was excluded from bidding based on the insufficiency of their contribution rather than their failure to meet state specifications).

e. This did not seem to be a wise use of public funds, which I believed are used in support of the printing of the Whitewater Today, since the sufficiency of contribution rather than lowest-cost bidder appeared to be the approved University policy for assigning printing bids.

f. I also felt that I had been essentially told to lie about the reason why The Register would not be allowed to bid on the issue of The Register;

g. Although my sense of professionally ethics were enhanced by occassional professional articles, discussing ethical guidelines, considerations, and issues, and by a course on journalism law and ethics that I taught at the University, it did not take this background to sensitize me to the ethical problems associated with Mr. Spellman's actions toward The Register or with he request that I lie for him;

h. I consequently also felt that Chancellor Connor's order to follow and participate Mr. Spellman's unethical tactics represented an abuse of authority and mismanagement and a potential waste of public funds;

7. As a result of my concerns I felt that I could no longer work under the supervision of Mr. Spellman and I attempted to resign from the University by submitting a written notice to that affect on November 19, 1990; immediately following that, then Chancellor Connor persuaded me to withdraw my resignation and Chancellor Connor advised me that he would secure comparable alternative employment for me within the University where I would not be under the supervision of Mr. Spellman.

8. My letter of resignation to the University indicated that it would effective January 31, 1991; on January 31, 1991, I received a memo from Chancellor Connor (attached Exhibit A); this appeared to me to be an indication that I should retain my position until June 30, 1991, and that Chancellor Connor would seek comparable additional employment for me; I did not believe that this letter represented an accurate statement of the facts since I had in fact allowed Chancellor Connor to persuade me to not resign.

9. In response to Chancellor Connor's January threat of termination, I submitted a memo to Chancellor Connor (exhibit B), (accidentally dated February 22, "1990," it should have been dated "1991") indicating that I did not consider his correspondence to be an accurate representation of the facts since in fact I had not at that point resigned having been persuaded to withdraw same and advising him that I expected that he would find me comparable alternative employment within the University; in response, I received a memo from Chancellor Connor reiterrating his January 31 memo (Exhibit C).

10. I subsequently received a memo from Mr. Spellman spelling out my responsibities in News and Publications through June 30, 1991 (Exhibit D).

11. As a result of receiving these documents and while I continued to be titled Director of News and Publications and receive the salary of News and Publications Director, I consulted with my attorney who directed correspondence to Chancellor Connor dated April 2, 1991, a copy of which is attached hereto (Exhibit E).

12. Chancellor Connor's response, dated April 8, 1991, merely reiterated the University's position. Exhibit F.

13. In response to this communication my attorney drafted and directed to then Chancellor Connor

correspondence dated May 7, 1991. Exhibit G.

14. Then, in a memo dated June 18, 1991 (exhibit H), Chancellor Connor wrote to "offer" me the job as Outreach Program Specialist; because the letter indicated when I "will be assigned," and indicated an effective date of the transfer, I did not view the communication as a real offer; also, though the memo did indicate that Chancellor Connor was, as indicated in his January 31 memo, seeking to find other employment for me, Chancellor Connor had indicated that any such position would be "attractive enough [to me]" (exhibit A), meaning comparable in salary and level of authority; because I did not want to accept the offer, which would have reduced my salary by approximately $15,000.00, I did not sign the contract that was enclosed with Chancellor Connor's memo.

15. On or about July 1, 1990, I received a phone call at my home from then Chancellor H. Gaylon Greenhill. Mr. Greenhill informed me that I was to report of the office of Continuing Education and Outreach to assume a new position that of outreach specialist. I advise Chancellor Connor that I had not asked for such an assignment change, and I also asked him if I did not report to Continuing Education that I no longer would be employed at the University of Wisconsin-Whitewater and he replied "yes". I made no further indication to Mr. Greenhill regarding my intentions.

16. On or about July 2, I received a memo from Chancellor Greenhill (exhibit I) which made effective my involuntary reassignment to the Outreach Program Specialist position in the office of Continuing Education and Outreach at a salary approximately $15,000.00 less than I was then earning; I considered this to be a demotion and transfer because of my prior disclosure of information to The Register as to the truthful reason they were not allowed to bid on the issue of the "Whitewater Today" referred to above.

17. Because of the transfer,

demotion and what I felt to be undue punishment for disclosing the information disclosed for what I thought to be good and valid reasons which I set forth above, I began to experience intense pressure and emotional strain and as a result I found it necessary to obtain psychological treatment and counseling.

18. Because of the strain and emotional pressure I felt at having been punished by virtue of this transfer and demotion, I resigned my employment from the University on October 8, 1991; resignation was to be effective October 31, 1991. Exhibit J.

19. I felt at the time of my resignation, and still feel, that I was demoted, transferred, and punished for having told the truth to The Register about actions I felt to be ethically and possibly legally wrong in any setting and most certainly in state government.

Dated this 21st day of December, 1992.

/s/

Dale E. Reich

Subscribed to and sworn to before me this 21st day of December, 1992.

/s/

David P. Honan, Notary Public
Walworth County
My commission is permanent.

LIST OF ATTACHED EXHIBITS

Exhibit A: Memo from Chancellor Connor to Dale Reich, dated January 31, 1991 (Threatening Mr. Reich with Termination)

Exhibit B: Memo From Dale Reich to Chancellor Connor, dated February 22, 199(1) (Responding to Threat of Termination)

Exhibit C: Memo from Chancellor Connor to Dale Reich, dated February 27, 1991 (Reiterating Connor's January 31, 1991 Memo)

Exhibit D: Memo from Mr. Spellman, dated March 11, 1991 (Spelling out Mr. Reich's Responsibilities in News and Publications through June 30, 1991)

Exhibit E: Letter From Plaintiff's Attorney Devitt to Chancellor Connor, dated April 2, 1991.

Exhibit F: Chancellor Connor's Initial Response to Attorney Devitt, dated April 8, 1991.

Exhibit G: Second Letter From Attorney Devitt to Chancellor Connor, dated May 7, 1991.

Exhibit H: Memo from Chancellor Connor to Dale Reich, dated June 18, 1991.

Exhibit I: Memo from Chancellor Greenhill, dated July 2, 1991 (Confirming Mr. Reich's Transfer)

***Exhibit J:** Memo from Dale Reich to Dr. McLeRoy, dated october 8, 1991 (Resigning from the University, effective October 31, 1991)

***Exhibit K:** "Ethical Principles" Published by the National Society of Fund Raising Executives

***Exhibit L:** Memo from chancellor Connor, dated January 3, 1989 (Requesting a Transfer of Funds from the Foundation to the University)

***Exhibit M:** Foundation Telephone Listing and Invitation To Foundation Event (with a University return Address)

***Exhibit N:** Information Relating to Sources of Defendant Spellman's Income

***Exhibit O:** "Lease Between University and the Foundation (For On-Campus Housing of the Foundation)

***Exhibit P:** Letter from Chancellor H. Gaylon Greenhill, dated December 3, 1992 (in response to "Access To Records" request).

***Exhibit Q:** Article The Janesville Gazette, Friday November 22, 1991, (Including and Interview With Defendant Spellman)

*Filed in Circuit Court, but not attached to this Petition.

Exhibit A: Memo from Chancellor Connor to Dale Reich, dated January 31, 1991 (Threatening Mr. Reich with Termination)

UNIVERSITY OF WISCONSIN-WHITEWATER
800 West Main Street, Whitewater
Wisconsin 53190-1790
Office of the Chancellor

January 31, 1991

Mr. Dale Reich, Director
News & Publications
University of Wisconsin-Whitewater
Whitewater, WI 53190

Dear Dale:

At the time I received your letter of November 19, 1990 indicating your intention to resign from the University of Wisconsin-Whitewater on January 31, 1991, I stated that I thought you had acted in anger and haste and that you should allow me to try to find you another assignment at the University. I, therefore, took no action on your resignation at that time.

As you now know, I have been unsuccessful in identifying a new assignment for you. The discussion with Dean Barnett has indicated that because you lack three years of experience as a public school teacher you cannot supervise student teachers. There is the possibility of a one-quarter time temporary assignment in Observation and Participation and in working on the announcements of the new master's degree programs.

It is, therefore, with great regret that I accept your resignation from the University of Wisconsin-Whitewater. It would seem appropriate for you to remain on the academic staff until June 30, 1991 instead of leaving the University on January 31st. This will give you the opportunity to seek alternative employment and also will give me added time to see

whether there is an assignment here which would be attractive enough for you to continue here. As you know, I will also be leaving on June 30, and I do not think it fair to pass the problem of your job responsibilities to my successor. If you are agreeable to this extension of your resignation date, please let me know.

I regret very much having to accept your resignation when I encouraged you to withdraw it. I did not realize how difficult it would be to move you elsewhere for reasons which have been shared with you. Under these circumstances I want to provide you with ample time to make decisions about your future and also feel you out to have time beyond that which you indicated in your letter of resignation.

Nothing which has been said above in any way alters my high regard for you as a person and as a professional. I was hopeful from the very beginning that whatever problems which had arisen between you and Mr. Spellman might have been resolved. I did my best to make this happen, but it proved to be impossible.

Thank you for your more than a decade of service to the University of Wisconsin-Whitewater. I am sure that you know I wish you well for the future.

Cordially yours,
/s/
James R. Connor
Chancellor

Exhibit B: Memo From Dale Reich to Chancellor Connor, dated February 22, 199(1) (Responding to Threat of Termination)

RECEIVED
February 25 1991
CHANCELLORS OFFICE

February 22, 1990

TO: Chancellor James R. Connor

FROM: Dale Reich [initialed]

SUBJECT: Employment Status

I have received your letter of January 31, 1991 indicating that I am welcome to remain at UW-Whitewater until July 1, 1991.

As you will recall, you indicated to me at our meeting in December that you were going to reject and destroy my letter of resignation. I indicated to you that I consented to that action, and would accept your offer to find me an alternate position on campus.

As a result of that conversation, I do not consider the letter of resignation to be in effect. I continue to wait for my transfer to another office or unit on the UW-Whitewater campus.

In the meantime, I am accepting and completing assignments from my new office in Hyer 2.

Exhibit C: Memo from Chancellor Connor to Dale Reich, dated February 27, 1991 (Reiterating Connor's January 31, 1991 Memo)

UNIVERSITY OF WISCONSIN-WHITEWATER
800 West Main Street, Whitewater
Wisconsin 53190-1790
Office of the Chancellor

February 27, 1991

Mr. Dale Reich
University of Wisconsin-Whitewater
Whitewater, WI 53190

Dear Dale:

In response to your memorandum of February 22, 1991, "Employment Status," I would refer you to my letter of January 31, 1991. Your "employment status" is spelled out in that letter to you.

Sincerely yours,
/S/
James R. Connor
Chancellor

JRC/mw

Exhibit D: Memo from Mr. Spellman, dated March 11, 1991 (Spelling out Mr. Reich's Responsibilities in News and Publications through June 30, 1991)

RECEIVED
MAR 15 1991
Chancellor's Office

M E M O R A N D U M

TO Dale Reich

FROM Mike Spellman [initialed]

RE Work responsibilities through June 30, 1991

DATE 11 March 1991

Thank you for meeting with me regarding your work responsibilities now through June 30th. We agreed on the following responsibilities for your to accomplish:

1. Write graduation and honor roll releases.

2. Write cultural affairs press releases.

3. Write pre-events, special event and award releases.

4. Write Whitewater footnotes spots.

5. Work quarter time for the College of Education doing brochures and press releases.

The News and Publications office will be responsible for doing the actual mailings once you complete the writing of these releases.

Thank you for your assistance and

cooperation.

MCS:jmf

cc: Chancellor Connor
Vice Chancellor Gaylon Greenhill
Dean Barnett
Julie Darling

Exhibit E: Letter From Plaintiff's Attorney Devitt to Chancellor Connor, dated April 2, 1991.

APR 5 1991
CHANCELLOR'S OFFICE

SOFFA & DEVITT
ATTORNEYS AT LAW

332 W. WHITEWATER ST.
WHITEWATER, WISCONSIN 53190
SAM J. SOFFA AREA CODE 414
RUSSELL W. DEVITT TELEPHONE 473-5105

April 2, 1991

Chancellor James R. Connor
University of Wisconsin - Whitewater
800 West Main Street
Whitewater, WI 53190-1790

Re: Dale Reich

Dear Chancellor Connor:

Please be advised that Dale Reich has asked that I review certain actions which have occurred with respect to his employment status at the University of Wisconsin - Whitewater.

From the information provided, it appears that Mr. Reich enjoys indefinite status as an academic staff member and was appointed by you as Director of News and Publications.

It appears that a substantial redefinition of his duties and/or title has occurred without there having been any prior written notice to Mr. Reich or opportunity to respond to that. I am further concerned that it appears that Mr. Reich may have been penalized as a result of disclosing information relative to improper fundraising techniques which, in my opinion, would violate Mr. Reich's

legally protected rights.

The purpose of this correspondence is to bring these matters to your attention in an attempt to resolve the problems prior to the necessity of any further legal action. Please advise in the very near future any further clarification you feel is required so that I might be able to further advise Mr. Reich on these issues.

Thank you for your attention in this matter.

Very truly yours,

SOFFA & DEVITT
/s/
Russell W. Devitt

RWD:kk
cc: Dale Reich

Exhibit F: Chancellor Connor's Initial Response to Attorney Devitt, dated April 8, 1991.

UNIVERSITY OF WISCONSIN-WHITEWATER
800 West Main Street, Whitewater
Wisconsin 53190-1790
Office of the Chancellor

April 8, 1991

Mr. Russell W. Devitt
Soffa & Devitt Attorneys at Law
332 W. Whitewater Street
Whitewater, WI 53190

Dear Mr. Devitt:

I am responding to your letter of April 2, 1991 concerning Mr. Dale Reich, a member of the academic staff at the University of Wisconsin-Whitewater until June 30, 1991.

As you are undoubtedly aware, Mr. Reich voluntarily tendered his resignation as an indefinite appointee of the academic staff at this institution on November 19, 1990. His resignation was to be effective January 31, 1991.

On January 31, 1991, I wrote to Mr. Reich, accepting his resignation but asking him to remain until June 30, 1991. He thus continues on the University payroll until that date at which time he will leave his University employment.

In view of Mr. Reich's voluntary resignation as a member of the academic staff at this institution, I have no further comment on your letter of April 2.

Sincerely yours,
/s/
James R. Connor
Chancellor

JRC:mw
c: Mr. Dale Reich

Exhibit G: Second Letter From Attorney Chancellor Connor, dated May 7, 1991.

SOFFA & DEVITT
ATTORNEYS AT LAW

332 W. WHITEWATER ST.
WHITEWATER, WISCONSIN 53190
SAM J. SOFFA AREA CODE 414
RUSSELL W. DEVITT TELEPHONE 473-5105

May 7, 1991

Mr. James R. Connor, Chancellor
University of Wisconsin - Whitewater
800 West Main Street
Whitewater, WI 53190-1790

Re: Dale Reich:

Dear Chancellor Connor:

I previously directed correspondence to you detailing my concern with respect to Dale Reich's employment status. In response you indicated that he voluntarily resigned. Our position is that Dale's so called letter of "resignation" was in fact a protest over allegedly improper fund raising techniques of which, I believe, you have been made aware. In addition, it is our position that as Chancellor you requested that you be able to destroy Dale's letter of resignation, Dale consented, and thereafter it was considered by Dale to have been destroyed. Apparently, by the terms of your April 8 correspondence, the University is now considering that the "resignation" has been resurrected.

I have reviewed the Administrative Code provisions, the state statutes and the University of Wisconsin - Whitewater academic staff personnel policies and procedures. Since Dale continues to be

employed we do not consider that he has been terminated. If he is terminated it will be considered to be for unjust cause and will be pursued pursuant to the Administrative Code and personnel policies.

Generally it appears that Dale has the right to file a grievance. UWW Chapter 8 provides, in Dale's case, that if he goes through the grievance procedure, you as Chancellor will make the final decision. If we infer from the fact that you as Chancellor have already made a decision as to the various matters involving his employment status, then filing such a grievance may be a meaningless gesture and a waste of everyone's resources. If a grievance were filed pursuant to the grievance procedure, it would involve the following:

1. UWW Chapter 3.08 which provides that a significant change in existing conditions of appointment must be specified in writing at least 10 days prior to the change. This does not appear to have been followed in Dale's case as his conditions of appointment were substantially changed of January 31.

2. UWW Chapter 4.04 which provides that Dale must receive at least a six month notice that a fixed term appointment will not be renewed. As Director of News and Publications appears to be a fixed term appointment, (while "indefinite status academic staff" is not) it appears notice of termination of that appointment was not given six months in advance.

3. UWW Chapter 6, Dismissal of Academic Staff for cause. We would treat termination as dismissal for cause and UWW Chapter 6 must be observed. Of course, no charges have been filed nor has any opportunity for hearing been given. It appears a decision under UWW Chapter 6 is appealable to the Board of Regents and Dale would certainly like to avail himself of this appeal process and the opportunity to have a hearing.

With regard to the above, and to termination of indefinite status academic staff should that occur, it will be contended that Dale's right to free speech, his rights under the Wisconsin Statutes, including Section 895.65, his contract right to no discharge without just cause pursuant to Wisconsin Administrative Code Section UWS 11.01(1) and his state and federally protected rights to due process and equal protection have been violated.

If you have not made your final decision as Chancellor with respect to the above matters, I would appreciate it if you would provide a copy of this correspondence to Mr. Spellman, Mr. Reich's immediate supervisor, and ask that Mr. Spellman provide a response pursuant to UWW 8.05. If, on the other hand, the final decision has been made and thus the grievance procedure would be a useless gesture, we will proceed with appropriate Court action to enforce Dale's rights.

Please consider this and advise as to your conclusion regarding the grievance procedure so that we may take such further

action as may be appropriate.

Thank you for your attention in these matters.

Very truly yours,

SOFFA & DEVITT

/s/
Russell W. Devitt

RWD:kk

cc: Dale Reich

Exhibit H: Memo from Chancellor Connor to Dale Reich, dated June 18, 1991.

UNIVERSITY OF WISCONSIN-WHITEWATER
800 West Main Street, Whitewater,
Wisconsin 53190-1790
Office of the Chancellor

June 18, 1991

Mr. Dale Reich
N358 North Oak Clay Drive
Whitewater, WI 53190

Dear Mr. Reich:

I am writing to offer you the position of Outreach Program Specialist, for which you previously applied, effective July 1, 1991. You will be assigned to the Division of Continuing Education and Outreach with duties as indicated in the attached position description. The salary range for this position is Pay Range 4 from $23,996 to $35,995. Your salary will be $35,995 on an annual basis, payable in twelve installments.

As you know, your title as Director of News and Publications was a limited appointment in which you served at the pleasure of the appointing authority. That appointment was terminated with your resignation as of January 31, 1991. The University will make the position of Outreach Program Specialist available to you, and you should plan to report to Dean Thomas S. McLeRoy in Roseman 2013 on July 1st. While your limited appointment as Director has been terminated, you will retain your indefinite status as a member of the Academic Staff.

A contract for your to sign is enclosed. Please return it to my office

at your earliest convenience.

Sincerely yours,

/s/
James R. Connor
Chancellor

JRC:mw

Enclosure

c: Chancellor-Designate Greenhill
Dean Thomas S. McLeRoy

bc: Charles Stathas

UNIVERSITY OF WISCONSIN-WHITEWATER

ACADEMIC STAFF PROBATIONARY APPOINTMENT

DALE E. REICH
First Name Middle Initial Last Name

is hereby appointed as

Outreach Program Specialist of
Title

Continuing Education, Extension & Summer Session
Department or Area

The contractual period for this appointment is July 1, 1991

through June 30, 1992.

Appointment Basis:

Social Security No.: 387-48-9350

___ Academic Year

_X_ Annual

___ Contingency: _____

Date of Birth: 5/5/47

Base Salary: $35,995

Percent of Time: 100%

Contract of Salary: $35,995

Pursuant to University of Wisconsin-

Whitewater Academic Staff Personnel Rules, Section 3.03, the maximum probationary period will be _____ years and the decision on indefinite status is scheduled for Indefinite.

Degree Date Institution

B.A. 1972 University of Wisconsin - Whitewater, Whitewater, WI

M.A.T. 1977 University of Wisconsin - Whitewater, Whitewater, WI

ACCEPTED: _____ _____
(Date) (Signature)

APPROVED: _____ _____
(Date) (Signature,Chancellor)

PLEASE RETURN THIS CONTRACT WITHIN TWO WEEKS AFTER RECEIPT

Exhibit I: Memo from Chancellor Greenhill, dated July 2, 1991 (Confirming Mr. Reich's Transfer)

TO: Betty Murray, Payroll
and Benefits Manager

FROM: H. Gaylon Greenhill /s/

DATE: July 2, 1991

RE: Dale Reich

Effective July 1, 1991, Dale Reich is assigned as Outreach Program Specialist (S92-D-N-04) in the Office of Continuing Education and Outreach at a salary rate of $35,995 on an annual, twelve month, basis. His indefinite status in the Academic Staff is as Outreach Program Specialist, Pay Grade 4.

HGG:mys

cc: Dale Reich
Charles Stathas
Russell Devitt
Tom McLeRoy
Dick Lee
Randy Marnocha
Rose Grandt

AMENDMENTS TO THE UNITED STATES CONSTITUTION

FIRST AMENDMENT TO UNITED STATES CONSTITUTION

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USCS § 1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

893.80 **Claims against governmental bodies or officers, agents or employee; notice of injury; limitation of damages and suits.** **(1)** Except as provided in subs. (1m) and (1p), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employe of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employe under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employe; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is

disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. No action on a claim against any defendant, fire company, corporation, subdivision or agency nor against any defendant officer, official, agent or employe, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

(1m) With regard to a claim to recover damages for medical malpractice, the time period under sub. (1) (a) shall be 180 days after discovery of the injury or the date on which, in the exercise of reasonable diligence, the injury should have been discovered, rather then a 120 days after the happening of the event giving rise to the claim.

(1p) No action may be brought or maintained with regard to a claim to recover damages against any political corporation, governmental subdivision or agency thereof for the negligent inspection of any property, premises, place of employment or construction site for the violation of any statute rule, ordinance or health and safety code unless the alleged negligent act or omission occurred after November 30, 1976. In any such action, the time period under sub. (1) (a) shall be one year after discovery of the negligent act or omission or the date on which, in the exercise of reasonable diligence the negligent act or omission should have been discovered.

(1t) Only one action for property damage may be brought under sub. (1p) by 2 or more joint tenants of a single-family dwelling.

(2) The claimant may accept payment of a portion of the claim without waiving the right to recover the balance. No interest may be recovered on any portion of a claim after an order is drawn and made available to the claimant. If in an actio the claimant recovers a greater sum than was allowed, the claimant shall recover costs, otherwise the defendant shall recover costs.

(3) The amount recoverable by any person for any damages, injuries or death in any action founded on tort against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employes for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally, shall not exceed $50,000, except that the amount recoverable shall not exceed $25,000 in any such action against a volunteer fire company organized under ch. 213 or its officers, officials, agents or employes. If the volunteer fire company is part of a combined fire department, the $25,000 limit still applies to actions against the volunteer fire company or its officers, officials, agents or employes. No punitive damages may be allowed or recoverable in any such action under this subsection.

(4) No suit may be brought against any volunteer fire company organized under ch. 213, political corporation,

governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employes nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

(5) Except as provided in this subsection, the provisions and limitation of this section shall be exclusive and shall apply to all claims against a volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency or against any officer, official, agent or employ thereof for acts done in an official capacity or the course of his or her agency or employment. When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency or any officer, official, agent or employe thereof for injury, damage or death, such statute shall apply and the limitations in sub. (3) shall be inapplicable.

(6) A 1st class city, its officers, officials, agents or employes shall not be liable for any claim for damages to person or property arising out of any act or omission in providing or failing to provide police services upon the interstate freeway system or in or upon any grounds, building or other improvement owned by a county and designated for stadium or airport purposes and appurtenant uses.

893.82 Claims against state employes; notice of claim; limitation of damages. **(1)**(a) The purposes of this section are

1. Provide the attorney general with adequate time to investigate claims which might result in judgments to be paid by the state.

2. Provide the attorney general with any opportunity to effect a compromise without a civil action or civil proceeding.

3. Place a limit on the amounts recoverable in civil actions or civil proceedings against any state officer, employe or agent.

(b) The provisions of section shall be liberally construed to effectuate this intent.

(2) In this section:

(a) "Civil action or civil proceeding" includes a civil action or civil proceeding commenced or continued by counter-claim, cross claim or 3rd-party complaint.

(b) "Claimant" means the person or entity sustaining the damage or injury or his or her agent, attorney or personal representative.

(c) "Damage" or "injury" means any damage or injury of any nature which is caused or allegedly caused by the event. "Damage" or "injury" includes, but is not limited to, any physical or mental damage or injury or financial damage or injury resulting from claims for contribution or indemnification.

(d) "State officer, employe or agent" includes any of the following persons:

1. An officer, employe or agent of any nonprofit corporation operating a

museum under a lease agreement with the state historical society.

1m. A volunteer health care provider who provides services under s. 146.89.

2. A member of a local emergency planning committee appointed by a county board under s. 59.07 (146) (a).

3. A member of the board of governors created under s. 619.04 (3), a member of a committee or subcommittee of that board of governors, a member of the patients compensation fund peer review council created under s. 655.275 (2) and a person consulting with that council under s. 655.275 (5) (b).

(3) Except as provided in sub. (5m), no civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties, and no civil action or civil proceeding may be brought against any nonprofit corporation operating a museum under a lease agreement with the state historical society, unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved. A specific denial by the attorney general is not a condition precedent to bringing the civil action or proceeding.

(4) (a) Except as provided in par. (b), if the civil action or proceeding under sub. (3) is based on contribution or indemnification, the event under sub. (3) is the underlying cause of action, not the cause of action for contribution or indemnification, and, except as provided in sub. (5m), the 120-day limitation applies to that event.

(b) 1. If the claimant under par. (a) establishes that he or she had no actual or constructive knowledge of the underlying cause of action at the time of the event under sub. (3), except as provided in sub. (5m), the 120-day limitation under sub. (3) applies to the earlier of the following:

a. The date the cause of action for contribution or indemnification accrues.

b. The date the claimant acquired actual or constructive knowledge of the underlying cause of action.

2. The claimant has the burden of proving he or she had no actual knowledge of the underlying cause of action under this paragraph.

(5) The notice under sub. (3) shall be sworn to by the claimant and shall be served upon the attorney general at his or her office in the capitol by certified mail. Notice shall be considered to be given upon mailing for the purpose of computing the time of giving notice.

(5m) With regard to a claim to recover damages for medical malpractice, the time periods under subs. (3) and (4) shall be 180 days after discovery of the injury or the date on which, in the exercise of reasonable diligence, the injury should have been discovered, rather than 120 days after the event causing the

injury.

(6) The amount recoverable by any person or entity for any damages, injuries or death in any civil action or civil proceeding against a state officer, employe or agent, or against a nonprofit corporation operating a museum under a lease agreement with the state historical society, including any such action or proceeding based on contribution or indemnification, shall not exceed $250,000. No punitive damages may be allowed or recoverable in any such action.

(7) With respect to a state officer, employe or agent described in sub. (2) (d) 3, this section applies to an event causing the injury, damage or death giving rise to an action against the state officer, employe or agent, which occurs before, on or after April 25, 1990.

895.65 Government employer retaliation prohibited. (1) In this section:

(a) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty.

(b) "Employe" means any person employed by any governmental unit except:

1. A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of ch. 13.

2. A person who is, or whose immediate supervisor is, assigned to an executive salary group under s. 20.923.

(c) "Governmental unit" means any association, authority, board, commission, department, independent agency, institution, office, society or other body in state government created or authorized

to be created by the constitution or any law, including the legislature, the office of the governor and the courts. "Governmental unit" does not mean any political subdivision of the state or body within one or more political subdivisions which is created by law or by action of one or more political subdivisions.

(d) "Information" means information gained by the employe which the employe reasonably believes demonstrates:

1. A violation of any state or federal law, rule or regulation.

2. Mismanagement or abuse of authority in state government, a substantial waste of public funds or a danger to public health and safety.

(2) An employe may bring an action in circuit court against his or her employer or employer's agent, including this state, if the employer or employer's agent retaliates, by engaging in a disciplinary action, against the employe because the employe exercised his or her rights under the first amendment to the U.S. constitution or article I, section 3, of the Wisconsin constitution by lawfully disclosing information or because the employer or employer's agent believes the employe so exercised his or her rights. The employe shall bring the action within 2 years after the action allegedly occurred or after the employe learned of the action, whichever occurs last. No employe may bring an action against the department of employment relations as an employer's agent.

(3) If, following the close of all evidence in an action under this section, a court or jury finds that retaliation was the primary factor in an employer's or

employer's agent's decision to engage in a disciplinary action, the court or jury may not consider any evidence offered by the employer or employer's agent that the employer or employer's agent would have engaged in the disciplinary action even if the employe had not disclosed, or the employer or employer's agent had not believed the employe disclosed, the information.

(4) If the court or jury finds that the employer or employer's agent retaliated against the employe, the court shall take any appropriate action, including but not limited to the following;

(a) Order placement of the employe in his or her previous position with or without back pay.

(b) Order transfer of the employe to an available position for which the employe is qualified within the same governmental unit.

(c) Order expungement of adverse material relating to the retaliatory action or threat from the employe's personnel file.

(cm) Order the employer to pay compensatory damages.

(d) Order the employer to pay the employe's reasonable attorney fees.

(e) Order the employer or employer's agent to insert a copy of the court order into the employe's personnel file.

(f) Recommend to the employer that disciplinary or other action be taken regarding he employer's agent, including but not limited to any of the following:

1. Placement of information describing the agent's action in his or her personnel file.

2. Issuance of a letter reprimanding the agent.
3. Suspension.
4. Termination.

The Janesville Gazette

Friday, November 22, 1991

"Paper refuses to donate, loses contract: Ex-employee"

By Stan Milam
Gazette Staff

WHITEWATER

MADISON - A former UW-Whitewater employee claims the school transferred a contract from the Whitewater Register because the firm did not contribute enough to a university building fund.

Dale Reich, former news and publications director for the university, has filed a claim with the state attorney general's office alleging retaliation when he informed the newspaper of the school's decision.

Reich claims he was demoted and his pay cut by $14,000 a year as a result of the incident.

Reich's claim alleges that Assistant Chancellor Michael Spellman announced in the fall of 1990 that the Register would not be awarded the printing contract.

Reich claims that was "because the principals of the Whitewater Register did not make what Spellman felt to be a sufficiently generous contribution for the new multi-purpose auditorium."

When Tom Coe, register editor and publisher, asked why the university transferred the contract, Reich told him

about Spellman's comments regarding contributions to the auditorium project, according to the claim.

Spellman admonished him for a "breach of management confidence," Reich said.

Coe would not comment on Reich's claim.

"I assume this will end up in court, so I don't think I should make any statements," he said.

Spellman would not comment directly on Reich's claim that he cut off the Register from the university contract because the newspaper rejected a request for a contribution.

The rejection "was not the primary factor" in transferring the printing contract, Spellman said.

"There was a problem with the Whitewater Register in the printing of the summer issue of the UW-Whitewater Today, a campus publication funded by the UW-Whitewater Foundation. A decision was made to transfer the printing contract to another vendor.

"In the months that followed, efforts were made to explain this action to the owners of the Whitewater Register and since that time the issue has been fully resolved with them," Spellman said.

"The relationship today between the UW-Whitewater Foundation and the Whitewater Register is strong and

positive.

"It is inappropriate for me to provide any further personal comment at this time while a claim is pending, as it is the university policy not to discuss personnel claims," Spellman said.

"I am cooperating with all concerned parties, and I look forward to a proper conclusion in the near future."

In November 1990, Reich said, he resigned over the matter, but his letter of resignation was torn up by Chancellor James Connor.

In January, Reich said, Connor told him his letter of resignation would be accepted, although he could stay on at the school until July 1.

Spellman then relieved him of his duties as director of news and publications and reassigned him at the same pay level until July 2.

Then Chancellor H. Gaylon Greenhill, who had replaced Connor, reassigned him to the Office of Continuing Education as an outreach program specialist for about $14,000 less in annual salary, Reich said.

Reich resigned from the University at the end of October.

University officials, including Spellman, Connor and Greenhill, "retaliated for disclosing information (I) reasonably believed demonstrated a violation of state law and mismanagement

or abuse of authority in state government," Reich said in his claim.

Reich claims he suffered emotionally, economically and in reputation as a result of the retaliation.

Assistant Attorney General Charles Hoornstra is reviewing the claim.

"We are in the process of looking into the claim and legal counsel for the university system is assisting," Hoornstra said.

"I expect to have a decision in a couple of weeks."

No demands were made in the claim.

If the state denies his claim, Reich can pursue the matter through a suit in the Walworth County Circuit Court.

Reich received a bachelor's degree from Whitewater in 1972 and a master's degree in 1977. He served as managing editor of the Register and a journalism instructor in the UW-Whitewater Department of Communications before becoming director of news and publications in 1978.

Daily Jefferson County Union

Monday, December 9, 1991

"Reich files claim against the UW"

WHITEWATER (AP) -- A foundation associated with the University of Wisconsin-Whitewater canceled its contract with a company that didn't donate money to a campus fund, state Justice Department records show.

Dale Reich, former publications director for the college, says he quit his job under pressure after he was reprimanded for commenting on the contract affair.

Besides unemployment compensation, Reich filed a claim against the state, asking unspecified compensation for personal financial and emotional loss.

Charles Hoornstra, an assistant attorney general, says the state needn't pay the claim. The University Foundation, not the university itself, handled the contract and isn't subject to laws regulating state contract, he said.

Reich says assistant chancellor Michael Spellman wanted to deny a printing contract to the Whitewater Register because the company didn't contribute to an auditorium project.

"It is true that the assistant chancellor stated that a contract should not be awarded to a contractor who declined to contribute to a University

Foundation fund-raising project," Hoornstra said in a letter to Reich's attorney.

Spellman, in a written response quoted last week by the Janesville Gazette, insisted the Register's failure to contribute "was not the primary factor" in shifting the contract.

Reich says he submitted his resignation after Spellman reprimanded him for "breach of management confidence."

Chancellor James Connor would not accept his resignation and persuaded him to stay, Reich said.

Two months later, however, Connor could not find another job for him and decided to accept the resignation, Reich said. he said he then decided to quit in October after Spellman demoted him to a job paying $14,000 less per year.

The underlying reason for Reich's resignation "was his disappointment in his prior personnel evaluation," Hoornstra wrote, "not the decision of his supervisor not to aware a certain contract."

Another reason to deny Reich's claim is that it was not filed within the 120-day period established by state law, Hoornstra said.

Vince Barker, a Janesville examiner with the state Department of Industry Labor and Human Relations, said Reich was entitled to unemployment checks.

Reich "quit his work with good cause attributable to the employer," Barker said. "The employee quit after receiving a demotion and substantial salary reduction.... It appears that these action by the employer were taken more out of retaliation...."

The university can appeal the ruling.

Reich meanwhile, could respond to Hoonstra's [sic] claim denial by filing suit in Walworth County Circuit Court.

The Janesville Gazette

June 1, 1994

"Phone call turns UW-W supporter into its biggest critic"

By Stan Milam
Gazette Staff

WHITEWATER-When he came to UW-Whitewater in 1969, Dale Reich didn't know he would be allied to the school for the next 22 years.

And during the more than two decades he studied taught and worked at the university, Reich never dreamed he'd leave under such confrontational circumstances.

UW-W became such and important part of Reich's life that he could not imagine leaving, much less quitting in desperation and filing suit against his alma mater.

The tortured legal battle started in the final weeks of 1991, when Reich says he was forced to quit. The previous year had seen him lose his job as director of the UW-W News and Publications Department, a post he had held since 1978.

Reich's unprecedented transformation from one of the school's most vigorous supporters to its most prominent critic is the result of a phone call he received in October 1990.

Reich's account of the events that led up to his suit reported in this story were gleaned from court documents and

interviews before he filed suit against the university. His lawyer has advised him not to comment on the case while the suit is pending.

The October 1990 phone call was from Tom Coe, the owner of the Whitewater Register and an associated print ship. Part of Coe's printing business relies on contracts with the university.

Coe called Reich to ask why his firm had lost a contract with school's alumni association, the UW-Whitewater Foundation. Reich told him the contract, for the printing of the foundation's newsletter, UW-Whitewater Today, was canceled because of poor printing quality.

But a minute after the call ended, Reich called Coe back to tell him there was another reason. Coe also lost the contract, Reich told him, because Coe refused to contribute to the university's auditorium fund drive.

Reich's superiors, who included then-chancellor James Connor and Michael Spellman, the assistant chancellor for university relation, were not pleased with Reich's second telephone conversation. A couple of days after the call, Reich was summoned to Connor's office.

Reich says Connor reprimanded him for "disclosing Mike's dirty laundry" and embarrassing the school.

Spellman confirmed in an Oct. 30, 1990, memo that the lack of a contribution from Coe was a factor in not renewing the

contract.

"I indicated that I had in fact told the staff that I felt no further obligation and desire to do any additional Foundation business with the Register if they do not appreciate the almost $250,00-plus business we have done with them over the past three years," Spellman said. "I indicated to Tom Coe that I had made that statement in the heat of battle and that I was in error and would like bygones to be bygones."

At the same meeting in which he was reprimanded, Reich said, he was told that changes in his employment were planned.

A few days later, Reich submitted a letter of resignation.

Connor eventually talked him out of resigning, Reich said, and offered him a job elsewhere in the university. Reich quit Oct. 31, 1991, citing intolerable pay cuts (his annual salary was cut by $14,000), humiliating work assignments and tasks requiring training he did not have.

Since he left the university, Reich has lost his home, his savings and his retirement account in addition to his job. He substitute-teaches in area schools and earns additional income as a free-lance writer for several publication, including The Janesville Gazette.

Reich's suit against the university claims that his reputation was tarnished and he suffered emotionally and economically when the school retaliated

for his disclosing Spellman's decision to award a contract based on the contributions to the school. The university counters that:

- The contract in question was between Coe and a charitable foundation that supports the university, and therefore the contract was not subject to state bidding requirements.

- Failure by the printer to make a contribution to the auditorium fund is not a "forbidden" reason for refusal to contract with the printer again.

- In any case, the university acted to keep Reich employed; Reich accepted a new position and later quit.

The university also cites the "limited immunity" defense, which protects certain governmental bodies from lawsuits. The immunity grants protection when an otherwise illegal act is committed, such as punishing a so-called whistle-blower, if the act was not knowingly committed.

Reich initially was awarded unemployment compensation, but the state successfully appealed that ruling.

Jefferson County Circuit Court Judge John Ullsvik later reinstated Reich's unemployment compensation eligibility. The judge's November 1993, decision provides some of the most pointed criticism of Spellman and the university:

"The (UW-Whitewater) foundation does not appear to be very separate from the

university," Ullsvik said. "The court is also troubled by the circumstances of an assistant chancellor, a state employee, prohibiting contracting with a contractor in part for the reason that the contractor failed to make a gift for state university."

Ullsvik's decision is Reich's only victory in his ongoing fight.

After filing a claim with the state citing retaliation by UW-Whitewater, which the state denied, Reich filed his lawsuit in Walworth County Circuit Court Judge John Race summarily dismissed Reich's suit on the basis of the limited immunity defense.

Reich appealed the lower court ruling. The District 2 Court of Appeals is expected to release its decision today.

The case hinges on complicated legal issues, as most civil lawsuits do, but Reich sees it as a matter of public accountability. He said he feels he was forced out of the university for refusing to lie.

The state is vigorously defending the school and Spellman. Michael Losse, an assistant attorney general, offered to settle the claim in September by agreeing not to go after Reich for costs if he would drop the suit.

Reich is asking for compensatory and punitive damages. But he says he's lost more than just wages.

"I lost my career, but I also lost my respect for what I thought was a great institution," he said. "There's more at stake here than money."

I-14

The Janesville Gazette

June 1, 1994

"REICH LOSES SUIT"

MADISON-A state Court of Appeals ruled against Dale Reich this morning, but Reich's lawyer says he will appeal.

Reich has no right to sue the UW-Whitewater or its officials even if his First Amendment right to free speech was violated, the court ruled.

The court agreed with a lower court ruling that the school and its officials are immune from a suit.

"Our Supreme Court has recognized that an employer's interest in confidentiality and discipline can outweigh an employee's interest in free speech," The Appeals Court said. "The defendants are entitled to qualified immunity if they can show that they were acting pursuant to a superior interest. They argue that they had a superior interest in deterring other employees from attempting Reich's tactics. We are satisfied that the defendant's need for confidentiality, the need to encourage a close and personal relationship between Reich and his superiors and the time, place and manner of Reich's speech weigh against Reich's interest in free speech."

Reich's attorney, Russell Devitt of Whitewater, said this morning he had not received a copy of the decision.

"Therefore I can't comment on the decision, but I can say that I'm fairly confident we will ask the Supreme Court to review the decision.

Milwaukee Sentinel

June 2, 1994

"Employee's honesty ruled inappropriate"

By MIKE MULVEY
Waukesha County Bureau

Waukesha -- A moral repugnancy to lying doesn't protect from discipline a former University of Wisconsin-Whitewater official who disobeyed a superior when he told the truth, a state appellate court ruled Wednesday.

Dale E. Reich, former UW-Whitewater director of News and Publication, was not exercising his First Amendment right to protected free speech when he told a contractor it was being dumped for giving a less-than-generous donation to the university, said the 2nd District Court of Appeals in Waukesha.

The appellate panel said that by disobeying a superior who had allegedly instructed him to lie to the contractor, Reich undermined the working relationship he had with university administrators and threatened the morale of co-workers.

Reich forfeited his protection as a "whistle-blower," in part, because the university's need to trust its employees outweighed his moral dilemma, the appellate court said.

According to the appellate court:

Reich lost his job in 1991 after

Assistant Chancellor Michael Spellman told him to stop giving business to a printing firm "that had not made a sufficient contribution to a fund-raising campaign that Spellman was conducting" for a new auditorium.

Spellman instructed Reich to tell the firm the university was unhappy with the quality of the printing. Reich initially gave that reason, but later felt guilty and told the truth to the firm.

His chagrined superiors threatened firing him, then reassigned him to a lower paying job. Reich later quit and filed suit in Walworth County Circuit Court.

Judge John R. Race granted summary judgment in favor of the university last year. Reich appealed.

Reich's case would have been bolstered had he shown that the university had broken the law by its practices, the appellate panel noted.

"Reich does not assert that he believed any laws were broken by the defendants," the appeal court said. "He only states that he found their bidding practices immoral."

Reich's attorney, Russell W. Devitt, said he would now appeal to the state Supreme Court.

"He went along with what he was told to do until his conscience no longer allowed it," Devitt said.

The Janesville Gazette

July 9, 1994

"Former UW-Whitewater employee asks court to reconsider ruling"

By Stan Milam
Gazette Staff

MADISON -- Dale Reich has taken his case against UW-Whitewater to what may be the final step in a nearly four-year battle with the school.

Reich is a Milton resident whose writings as a correspondent appear in the Gazette.

He claims the university illegally retaliated against him when he disclosed that a local printing company, The Whitewater Register, was denied an alumni association printing job because it had not contributed enough to the school's auditorium building fund.

Reich resigned after being transferred and demoted from his original position as director of the News and Publications Office.

Reich's transfer and demotion followed verbal and written reprimands from his immediate supervisor, assistant chancellor Michael Spellman.

With the exception of a ruling that he was entitled to unemployment compensation, Reich has lost in each step of his legal battle with the school.

Walworth County Circuit Court Judge John Race dismissed Reich's suit after ruling that the school enjoys the legal concept of qualified immunity. Race also ruled that Reich filed a claim with the state after the legal deadline.

Reich appealed Race's ruling to the District 3 Court of Appeals. The Appeals Court rejected the appeal, as did the Wisconsin Supreme Court when Reich filed an appeal there.

Reich has now asked the Supreme Court to reconsider its decision. His petition for review cites a recent decision by the high court in the case of a State Investment Board employee.

That employee claims he was illegally fired for disclosing what he believes is incriminating information about a lobbyist who represented a client before the board.

The issue of whether Spellman's linking of contributions to university-related jobs by local businesses was illegal is not being discussed in the appellate maneuvering.

At issue in the legal arena is whether the university is immune from responsibility for limiting an employee's right to free speech and whether Reich filed his initial claim with the state in a timely fashion.

Reich's Whitewater attorneys, Russell Devitt and David Honan, argue that Reich's right to free speech outweighs the university's need for confidentiality.

The university argued that Spelman [sic] was the sole target of Reich's free speech and his disclosure was nothing other than a breach of confidence. But Reich argues that he would not lie to a member of the public about what he believed was a policy that constituted mismanagement, a possible waste of public funds, and actions that he believed were in violation of fund-raising ethical standards, if not outright illegal.

"Incredibly, the Court of Appeals concluded that the (university) had an interest in confidentiality associated with the shakedown policy that had been initiated and applied against Whitewater businesses and in Spellman's direction to Reich 'not to tell The Register that it was losing the printing contract because of its failure to donate money to Spellman's fund-raising campaign,'" Devitt said in his petition for review.

"In other words, the court found that the (university) had a legitimate interest in ordering a state employee to lie to and intentionally mislead a member of the general public," Devitt said. "It is ludicrous to suggest that the (university) has any legitimate interest in confidentiality associated with either the questionable fund-raising practices employed or in Spellman's order to Reich to keep quite about them."

Reich claims that the triggering date to file a claim with the state was June 1991 when the Chancellor James Connor assigned Reich to a new position. The lower courts ruled that the triggering

date was in January 1991 when Connor accepted Reich's resignation, but also agreed to extend the resignation date to June 30 to look for other employment at the campus.

"This will give you the opportunity to seek alternative employment and also will give me added time to see whether there is an assignment here which would be attractive enough for you to continue here," Connor wrote.

"The fact remains that the triggering date for Reich's state claim is the June 1991 retaliatory transfer and demotion and not a termination which never occurred," Devitt said.

Devitt maintains the state received the proper 120-day notice of a claim based on the triggering date of June 1991.

UW-Whitewater Chancellor H. Gaylon Greenhill had a brief two-sentence response to Reich's petition for review.

"The university's position has been upheld by two lower courts on the county and state appeals lever," he said. "If this case proceeds any further, we look forward to a final positive outcome before the state Supreme Court."

The state has until Monday to respond to Reich's petition for review.

The Janesville Gazette

July 20, 1994

"Free speech suit goes to High Court"

Former UW-Whitewater worker
appeals retaliation claim

By Stan Milam
Gazette Staff

MADISON-It's now up to the Wisconsin Supreme Court to decide wither a former UW-Whitewater employee can sue school officials for retaliation.

Dale Reich, the former director of the UW-W News and Publications Department, claims he was demoted for disclosing that a local printer lost an alumni association job because he did not donate enough to a school building fund.

Reich later quit his job at the school and sued Michael Spellman, an assistant chancellor, former chancellor James Connor, and the UW Board of Regents.

His work as a free-lance writer often appears in the Janesville Gazette.

Reich's suit was summarily dismissed in Walworth County Court. Judge John Race ruled that the defendants enjoyed the legal protection called qualified immunity from Reich's claims. Race also said that Reich failed to file a claim before the legal deadline.

The District 2 Court of Appeals upheld Race's rulings.

Reich then asked the Supreme Court to review the Appeals Court decision.

Reich's petition for review "is a confused mass of inaccurate 'facts' without citation to the record and without legal citations," said Michael Losse, an assistant attorney general who represents the defendants in the case. "This case involves qualified immunity, not retaliation on the merits."

Previous court rulings in the defendants' favor indicate that Reich's right to free speech does not outweigh the defendants' interest in confidentiality.

But, Losse said, Reich would not fare well even if the case were decided on the merits.

Public employees may criticize their supervisors, but the employee can escape discipline only if the criticism is not a personal gripe, Losse said.

Reich intended to embarrass and humiliate Spellman in front of an important client without warning, Losse said.

"The right to criticize is not the right to sabotage," Losse said. "The UW-Whitewater and alumni foundation, which have innumerable business contacts in the community providing bother services and sources of contributions, have similar interest in deterring other employees from attempting (Reich's) tactics."

Losse admits that Spellman ordered

Reich not to tell the printer that one reason he did not get an alumni association printing job was because the printer did not contribute sufficiently to a school building fund.

But Losse denies Reich's claim that Spellman ordered him to mislead the public.

"The record demonstrates that Spellman told (Reich) that if the current printer inquired, he was to be told that the business was to be taken elsewhere because of printing problems without mention of the factor that he failed to make an adequate contribution," Losse said. "Misleading the public was never an issue."

Losse insists in his response that whether the defendants enjoy qualified immunity is a matter of law, not fact. As such, Losse said, a judge, not a jury should decide the case.

Reich's attorney, Russell Devitt of Whitewater, says the case should go to a jury.

"The issue is whether this case should be decided on its merits," Devitt said. "It is painfully obvious that state's position is that whatever the defendants did is immune. We simply do not agree with that.

"If they can tell someone to lie and then reprimand that employee for refusing to lie, is there anything they are not immune from? We believe a jury would not

agree with the state's position and that's why we want the Supreme court to first of all take this case and then decide that it should go back to Walworth County for a jury trial.

There are four possible results from Reich's request to have the Supreme Court review the case. The court could agree to Reich's request, it could deny the request, the Court of Appeals could review its decision on its own motion or Reich could petition the federal court to intervene if he receives no relief at the state level.

UNIVERSITY OF WISCONSIN-WHITEWATER
800 West Main Street, Whitewater,
Wisconsin 53190-1790
Office of the Chancellor

MEMORANDUM

TO: UW-Whitewater Faculty and Staff
UW-Whitewater Emeriti

FROM: Chancellor H. Gaylon Greenhill
/s/

DATE: June 15, 1994

RE: Dale Reich vs Michael Spellman, James Connor and the Board of Regents of the UW-System

Since the Wisconsin Court of Appeals II unanimously sustained the Walworth County Circuit Court in its decision against Dale Reich last week, there has been a concerted media campaign against Michael Spellman and the University. One sided stories have appeared in each of the daily newspapers of southern Wisconsin and the case has been the subject of the talk radio show of WTMJ personality, Charles Sykes.

To give some perspective to the recent media barrage, the University has released the enclosed statement. As you are well aware, it is difficult to defend oneself in the court of public opinion. There is, however, every indication that the legal case will be won at the Wisconsin Supreme Court if it is heard there just as it has prevailed at the Circuit Court and Wisconsin Circuit Court of Appeals levels.

The facts of the case are not as portrayed in the media. First, Dale Reich was not fired from his job at the University. He resigned of his own volition. As Director of the News and Public Affairs, he was a line administrator serving in what we call a "limited" position. All line administrators from the department chair through Chancellor serve "at the pleasure of their supervisor." This means that they can be removed from the limited position and reassigned to their back-up position if the hold a tenured faculty position or indefinite status in the academic staff. In Reich's case, he held indefinite status in the academic staff and was reassigned as an Outreach Manager by then Chancellor Connor. Dale Reich would be employed in that position today had he not, completely of his own volition, resigned from the University. After resigning, he began to claim that he was "fired" which simply is not the case.

I am very concerned that this unfair media barrage not damage the reputation of Assistant Chancellor Spellman, Chancellor Emeritus Connor nor the UW-Whitewater. Please be assured that neither Spellman nor Connor have acted improperly.

Please be assured of my continued confidence in Assistant Chancellor Michael Spellman to carry on his important assignments at UW-Whitewater, not the lease of which, is the Excellence for the 21st Century Campaign. If you would like any further information on this case, please call or write me.

HGG:rg
Enclosure
Phone: 414/472-1918 Fax: 414-472-1518

UNIVERSITY OF WISCONSIN-WHITEWATER
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[OFFICIAL PRESS RELEASE]

June 8, 1994
Contact: Walt Ulbricht (414) 472-1193

Wisconsin Court of Appeals Upholds UW-Whitewater in "Whistleblower" Case

WHITEWATER -- The Wisconsin Court of Appeals District II unanimously affirmed on Wednesday, June 1 a lower court's dismissal of a lawsuit brought against two UW-Whitewater officials.

Dale Reich, former director of news and publications, sued former UW-Whitewater Chancellor James R. Connor and Assistant Chancellor Michael Spellman for retaliation against his exercise of free speech under federal law and the state "whistleblower" act. Reich alleged that Spellman an Connor unlawfully disciplined and transferred him to a lower paying position after he disclosed that a local printer, the Whitewater Register, had lost a contract to the UW-Whitewater Foundation, in part, for not making a sufficient contribution to an auditorium fund raising campaign.

The Court of Appeals affirmed the Walworth County Circuit Court's decision that the legal doctrine of "qualified immunity" barred Reich's claim that federal law was violated. In addition, the Court of

Appeals rejected the plaintiff's state law "whistleblower" claim because Reich and his attorneys failed to file a timely notice of claim within the required 120-day period.

The Wisconsin Department of Justice, defending UW-Whitewater and its employees, argued that Reich was characterizing himself as a "whistleblower" in order to legitimize his own campaign of retaliation against Spellman, who had defeated Reich in competition for the position of assistant chancellor of university relations and given Reich a negative evaluation prior to Reich's alleged "whistleblowing."

The Department of Justice argued that court papers filed by the plaintiff show that Reich's alleged pangs of conscience were non-existent until his poor performance review, making his protestations of "whistleblowing" suspect. It demonstrated that Reich in his official duties himself decided to cancel the printing contract with the Whitewater Register due to printing quality-control problems.

STATE OF WISCONSIN JEFFERSON COUNTY
CIRCUIT COURT

DALE E. REICH,

Plaintiff,

vs. Case No. 92-CV-509

LABOR AND INDUSTRY REVIEW COMMISSION
and UNIVERSITY OF WISCONSIN-WHITEWATER,

Defendants.

MEMORANDUM DECISION[*]

. . . Reprimanding an employee and planning to change his employment for disclosing something unlawful or unethical about the employer's business practice may be "real and substantial" fault occasioned by the employer justifying the employee's resignation. [Citations omitted].

The Court is not satisfied by the record that contract bidding requirements did not apply here. The foundation does not appear to be very separate from the University. The Court is also troubled by the circumstance of an Assistant Chancellor, a State employee, prohibiting contracting with a contractor in part for

---

*This is a partial excerpt (pages 12-13) from a companion Memorandum Decision stemming from the petitioner's appeal of an adverse unemployment compensation decision by the administering agency. The petitioner argued that his departure from the University following his transfer and demotion constituted a constructive discharge.

the reason that the contractor failed to make a gift for a State University. It appears in this case that the decision to not contract with the printer again was made not by a separate foundation, but by the Assistant Chancellor, acting for the University. It is true, as the Assistant Attorney General argues, that there can be no extortion unless the person being extorted knows that he must give something to the extorter. In this case the necessity for a contractor to make a contribution to the auditorium fund, was evidently to be kept secret. Nevertheless, the Commission may want to conclude that contracts made or prohibited by a government official should in no way be conditioned upon payment of any extra benefit or kickback by the contractor, whether or not he knows the payment is required. Although there is no evidence of any risk of payment of a kickback in this case, refusal by the Assistant Chancellor to contract with a contractor in part because he failed to make a gift, is the first step on a slippery slope leading to distrust of government at least, and corruption at worst. Disclosure of such a potential harm is in the State's interest, not against it.

Dated this 3rd day of November, 1993.

BY THE COURT:

/s/_____
Honorable John M. Ullsvik
Circuit Judge

Supreme Court, U.S.
FILED
MAR 14 1995
OFFICE OF THE CLERK

No. 94-1373

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER Term, 1994

DALE E. REICH,

Petitioner,

v.

MICHAEL SPELLMAN, ASSISTANT CHANCELLOR, UNIVERSITY RELATIONS, UNIVERSITY OF WISCONSIN-WHITEWATER, JAMES R. CONNOR, FORMER CHANCELLOR, UNIVERSITY OF WISCONSIN-WHITEWATER, AND BOARD OF REGENTS OF THE UNIVERSITY WISCONSIN SYSTEM,

Respondents.

Petition for a Writ of *Certiorari* to the Court of Appeals for the State of Wisconsin, District II

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Page

State ex rel. Strykowski v. Wilke,
81 Wis. 2d 491, 507, 261 N.W.2d
434, 442 (1978) 29

Wis. Bingo Sup. & Equip. Co. v. Bingo
Control Bd.,
88 Wis. 2d 293, 301, 276 N.W.2d 716
(1979) 29

Yotvat v. Roth,
95 Wis. 2d 356, 362-69, 290 N.W2d
524 (Ct. App. 1980) 29

STATUTES AND RULES CITED

42 U.S.C. §1983 . . . . . 1, 2, 27

Sec. 893.82(2m), Wis. Stats. 26

Sec. 893.82(3), Wis. Stats. 25

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

LIST OF PARTIES 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 18

ARGUMENT 19

I. THIS CASE DOES NOT MEET THE CRITERIA FOR GRANTING A WRIT OF CERTIORARI. 19

II. THE RULINGS OF THE STATE COURTS BELOW GRANTING QUALIFIED IMMUNITY TO THE RESPONDENTS ARE CONSISTENT WITH WELL-SETTLED FEDERAL LAW ON QUALIFIED IMMUNITY. 20

III. THE PETITIONER'S ARGUMENT CONFUSES THE TEST FOR QUALIFIED IMMUNITY WITH THE TEST FOR RETALIATION ON THE MERITS. 24

IV. A FINDING OF QUALIFIED IMMUNITY IS COMPELLED WHEN APPLYING THE WELL-SETTLED LAW TO THE FACTS OF THIS CASE. 24

V. THE PETITIONER IMPROPERLY REPRESENTS THE STATE LAW NOTICE OF CLAIM ISSUE AS INVOLVING A QUESTION OF FEDERAL LAW. 25

Page

A. The Petitioner Failed To Comply With The Wisconsin Notice Of Claim Statute. 25

B. The Holdings Of The Courts Below Are Consistent Both With State Law And Prior Rulings Of This Court. 27

C. The Constitutionality Of The Wisconsin Notice Of Claim Statute Cannot Be Seriously Questioned. 28

CONCLUSION 30

CASES CITED

519 Corp. v. DOT,
92 Wis. 2d 276, 284 N.W.2d 643 (1979) 26

Anderson v. Creighton,
483 U.S. 635, 640 (1987) 20

Bartlett v. Fisher,
972 F.2d 911, 916 (8th Cir. 1992) 22

Benson v. Allphin,
786 F.2d 268 (7th Cir. 1986) . . 22

Carlson v. Pepin County,
167 Wis. 2d 345, 357, 481 N.W.2d 498 (Ct. App. 1992) 26

No. 94-1373

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1994

DALE E. REICH,

Petitioner,

v.

MICHAEL SPELLMAN, ASSISTANT CHANCELLOR, UNIVERSITY RELATIONS, UNIVERSITY OF WISCONSIN-WHITEWATER, JAMES R. CONNOR, FORMER CHANCELLOR, UNIVERSITY OF WISCONSIN-WHITEWATER, AND BOARD OF REGENTS OF THE UNIVERSITY WISCONSIN SYSTEM,

Respondents.

Petition for a Writ of *Certiorari* to the
Court of Appeals for the
State of Wisconsin, District II

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Did the state court of appeals properly affirm the grant of summary judgment to the respondents on the ground of qualified immunity on the petitioner's federal claim of retaliation in violation of 42 U.S.C. §1983?

The respondents believe that the petitioner improperly frames the questions presented because: 1) the state law claim is not properly before this court, making petitioner's questions II.A. & B. superfluous; 2) petitioner's question I.A. confuses the substantive test for unlawful retaliation on the merits with the test for qualified immunity; 3) petitioner's question I.B. is so laden with distorted or incomplete facts that it bears little relation to the case at bar; and 4) petitioner's question I.C. improperly attempts to inflate a state law procedural question into a question of federal law.

LIST OF PARTIES

The Board of Regents of the University of Wisconsin System is an agency of the State of Wisconsin, and as such is not a person within the meaning of 42 U.S.C. §1983. The Board of Regents was a party in the petitioner's state law claim, but was not a party in the federal law claim.

STATEMENT OF THE CASE

The respondents make this statement of the case to correct inaccuracies and omissions in the statement of the petitioner. The petitioner's statement of facts passes off argument and conclusion as fact, and omits facts in the record not helpful to petitioner's cause.

Please note that nearly the entire record in this case is made up of statements by the petitioner in two depositions and in two subsequent

critical of Reich's performance and resulted in a less than average pay increase for Reich (Id.). On June 19, 1990, Reich wrote a rebuttal to Spellman's evaluation of him and on it he indicated that a copy of his response was being sent to his attorney, Russell Devitt (Rec. 21:287, 325; Exhibit 21), who represents petitioner before this Court. Reich had been in regular contact with Attorney Devitt about his job situation (Rec. 21: 327). It is against this omitted scenario that the remaining facts developed.

The third paragraph of petitioner's statement (Pet. at 3), which deals with respondent Spellman's alleged "policy" of "conditioning" "university" business on contributions to the auditorium fund raising campaign, is unfairly misleading for having omitted the following facts.

At his deposition petitioner Reich claimed that in the spring of 1990, Spellman told Reich that The Register would not get the printing business for Whitewater Today because they did not make a sufficient contribution to the auditorium project (Rec. 21:343). He advised Reich that "They don't have to know that" (Id.) If asked Reich was to tell The Register only that they were unhappy with the quality of the printing, which was true (Id). Reich thought the Register's printing problems were sufficient to take the business elsewhere (Rec. 21:396). Reich believed that telling them only half the truth was wrong, but said nothing to Spellman or Connor about it (Rec. 21:344-45). Reich did not contact The Register to tell them about this wrongdoing (Rec. 21:347). He did not contact the District Attorney's

office, law enforcement or anyone else (Rec. 21:366, 384). He could not say there was anything unlawful in conditioning business upon contributions; only a personal sense of moral repugnancy (Rec. 21:340-42).

Despite Spellman's alleged threats to withdraw their business, The Register continued to print the summer 1990 and winter 1990-91 issues of Whitewater Today (Rec. 21:351, 352). Reich believed that since The Register was allowed to print two issues of Whitewater Today, after refusing to contribute, Spellman's "policy" against using them changed (Rec. 21: 354). At his deposition petitioner Reich further admitted that he really did not believe there was such a "policy" at the time The Register lost the business (Rec. 21:392-93).

The fourth paragraph of petitioner's statement (Pet. at 3) avers that petitioner was told to "lie" and explain that the loss of business "was based solely on poor quality of work." The averments are unfairly misleading because petitioner omits evidence in the record demonstrating the chronic quality problems with the printer in question, and petitioner's role in convincing respondent Spellman to find a new printer.

As far back as 1986, one of Reich's responsibilities as Director of News and Publications, was to edit and have published the newspaper of the University of Wisconsin-Whitewater Foundation, an alumni association, known as the Whitewater Today (Rec. 20:181; Exh. 13:4; Exhibit 14). On August 8, 1989, at a meeting of the University Relations staff,

Reich first informed Spellman that the quality of printing of the Whitewater Today needed to be improved (Rec. 21:496-498; Exhibit 37). According to Reich, Whitewater Today had printing problems with The Register dating back to 1986 (Id.). The quality of the photographs needed to be improved (Id.). Reproduction was poor (Rec. 21:555).

The printing problems continued. At a University Relations staff meeting on August 13, 1990, Reich reported that he was still not satisfied with The Register's printing of the Whitewater Today (Rec. 21:515-516, 519) . According to Reich, the picture quality was poor and printing decisions were made without consulting him first (Id.). Reich was going to solicit three new bids from printers for the next issue of the Whitewater Today (Id). Reich was the one who wanted to change printers, not Spellman (Rec. 21:Exhibit 41; 21:535-536).

On August 13, 1990, Spellman authorized Reich to begin the process of obtaining a new printer for the Whitewater Today (Rec. 21:Exhibit 41). Since the University of Wisconsin-Whitewater Foundation, a private foundation, and not the University, paid for the printing of the Whitewater Today, the printing was not subject to state bidding laws (Rec. 21:530-531). Reich agreed that the Foundation could give its business to people who contributed to the Foundation and found nothing wrong with this (Rec. 21:531-532).

The fifth paragraph of petitioner's statement (Pet. at 3-4) avers that the printer was denied the opportunity to

"bid" on a "contract" with the "university." This paragraph is unfairly biased and misleading because, as referenced elsewhere herein: 1) the printing business in question was that of the UW-Whitewater Foundation, a private non-profit corporation, and no university business was ever at stake; and 2) there was no "contract" or "bids" received, with the Foundation simply taking its business where it wanted to; 3) it implies, without directly stating, that any printing quality problems were negligible, if not non-existent; and 4) it fails to acknowledge that petitioner had never complained about legality or ethics to respondent Spellman, to respondent Chancellor Connor, to anyone else in the university system, or to any law enforcement or governmental oversight agency prior to divulging what he was instructed not to divulge to the printer.

In the Fall of 1990, petitioner Reich received a telephone call from Tom Coe of The Register, asking why The Register did not receive the printing job for the Fall issue of the Whitewater Today (Rec. 21:387-388). Reich told Coe that it was because of the printing problems (Id.). According to Reich, the printing problems the Whitewater Today had with The Register were sufficient alone to justify canceling the contract (Id.).

Later, Reich called Coe back and told him that there were two reasons why The Register did not get the printing business (Rec. 21:388-389). One was the printing problem and the other was the lack of sufficient contribution to the auditorium fund (Id.). By the time of this conversation with Coe, Reich had never

confronted Spellman with his opinion that conditioning business upon contribution was immoral, nor had he voiced such concern to Connor, Spellman's supervisor (Rec. 21:387).

The sixth paragraph of petitioner's statement (Pet. at 4) is unfairly biased in that it is not an assertion of fact with citation to the record, but merely an argument wherein the petitioner congratulates himself for making only a limited disclosure.

The seventh paragraph of petitioner's statement (Pet. at 4) is unfairly deceptive because, as referenced elsewhere herein: 1) it omits the fact that even after the disclosure to the printer petitioner failed to inform the respondents of his feelings or of his conversations with the printer; 2) the paragraph unfairly implies that the respondents' anger was directed solely at the fact of petitioner's disclosure rather than at his duplicity both before and after the disclosure; and 3) it alleges a "progressive series of retaliatory actions" while omitting important facts in the sequence of events tending to disprove the assertion.

Reich first mentioned the contribution issue to Spellman during an October 26, 1990, meeting that Spellman had convened to discuss the matter of Reich's disclosure (Rec. 21:556-557). Spellman, Reich, Coe and Howard Marklein were at that meeting (Id.). After the meeting ended, Spellman chastised Reich for having previously told Coe about the contribution issue (Id.). Spellman stated "You knew you could have told them just

the printing problem; you didn't have to breach a management confidence" (Rec. 21:557).

At his deposition petitioner Reich admitted the following adverse consequences to his working relationship with respondent Spellman. In the Fall of 1990, the work relationship between Reich and Spellman was tense, they avoided each other, and they did not speak (Rec. 21:412-413). Spellman no longer confided in Reich (Rec. 21:414). This situation had a negative impact on the staff (Rec. 21:561). They were under stress and the situation between Reich and Spellman was disruptive to the office (Rec. 21:464).

On or about November 16, 1990, Reich had a meeting with Spellman and Connor (Rec. 21:387). At this meeting, for the first time, Reich told Spellman and Connor that he believed Spellman's conduct concerning the contribution issue and The Register was wrong (Id.). Petitioner Reich admitted that no one threatened to fire or demote him (Rec. 21:416).

On or about November 19, 1990, Reich submitted a letter of resignation from the University to Connor, giving no reasons for his decision (Rec. 21:330-31; Exhibit 22). Petitioner Reich further admitted that the resignation was not prepared in response to any threat by Spellman or Connor that they were going to fire him (Rec. 21:333). Petitioner Reich admitted that he was never threatened with discharge or demotion for revealing information to Coe and suffered only a verbal reprimand prior to resigning (Rec. 21:547).

The petitioner's seventh paragraph concludes with an assertion that the second specific act of retaliation was "involuntary physical relocation" to "a converted storage space," and cites to his own affidavit, Appx. D (at 6-7), as authority. Please note that neither these pages nor any other in the affidavit anywhere mention the event.

The eighth paragraph of petitioner's statement (Pet. at 4-5) is accurate insofar as it acknowledges that the only consequence for petitioner's entire course of conduct was a verbal reprimand and instruction that if he wanted to work for respondent Spellman he must obey his orders. It is unfairly misleading, as referenced elsewhere herein, in that: 1) it minimizes and distorts the fact that petitioner unequivocally resigned as Director of News and Publication; and 2) it misrepresents documents proving that respondent Chancellor Connor's offer to find other university employment was gratuitous, contingent upon availability, and never understood to mean "comparable employment" or pay equal to the position petitioner was resigning.

A week after submitting his resignation Reich and Connor met to discuss the resignation (Rec. 21:368-69). Connor stated that he would not accept the resignation and would attempt to find another job for Reich at the University (Id.). Reich agreed with Connor's compromise (Id.). But Reich did not tell Connor what kind of job he wanted or where he wanted to work (Rec. 21:369). In December of 1990, Reich established an attorney/client relationship with Attorney Devitt over this situation (Rec. 21:401).

In subsequent meetings with Connor in December of 1990 and January of 1991, Connor suggested looking for employment for Reich in the Communications Department and Continuing Education (Rec. 21:371-75). Although Reich was agreeable to working in either of these areas, Connor could not find positions for Reich there (Id.). Reich was disappointed that Connor could not place him in Continuing Education as he had applied for this job twice before (Rec. 21:377).

Between November 19, 1990, and January 31, 1991, Reich did nothing whatsoever to identify jobs on campus he was interested in, nor did he visit the placement office to look for work or send out resumes soliciting work (Rec. 21:407). Petitioner Reich further admitted at his deposition that he never gave respondent Connor any salary requirements he had for a new job (Rec. 21:376). Through June 30, 1991, Reich did nothing to help Connor find employment for him on campus because he expected Connor to do the looking for him (Rec. 21:418). Reich acknowledged at his deposition that he did not know of any areas where Connor could have looked for work for him where he did not look (Rec. 21:419).

By letter dated January 31, 1991, Connor informed Reich that he was unable to find a job on campus for him and was accepting his November 19, 1990, letter of resignation "from the University of Wisconsin-Whitewater" in its entirety (Pet. Appx. at E-11, E-12; Rec. 21:400; Exhibit: 23). Reich's last day of employment was to be June 30, 1991, rather than January 31, if Reich was agreeable (Id.). This was both to give petitioner

time to seek alternative employment, and a last chance for respondent Connor to find an alternative position at the university (Id.). The Wisconsin trial and appellate courts below have both held that this letter started the 120 day notice of claim clock under state law.

The ninth paragraph of petitioner's statement (Pet. at 5) is unfairly deceptive because it mischaracterizes or omits altogether documentation that proves the historical facts.

On or about February 1, 1991, Reich was transferred to a new office in another building away from Spellman (Rec. 21:415).

By memo dated February 22, 1991, Reich objected to the proposed termination of his employment, claiming that his resignation had not been accepted (Pet. Appx. at E-14; Rec. 21:407-8; Exhibit 24). In this memo petitioner acknowledged that his resignation from the position under respondent Spellman was never in doubt, and that the only dispute was respondent Connor's alleged obligation to find him an alternative position:

> As you will recall, you indicated to me at our meeting in December that you were going to reject and destroy my letter of resignation. I indicated to you that I consented to that action, and would accept your offer to find me an <u>alternate</u> position on campus.
>
> As a result of that conversation, I do not consider the letter of resignation to be

> in effect. I continue to wait for my transfer to another office or unit on the UW-Whitewater Campus.

(Pet. Appx. at E-14; Rec. 21:407-8; Exhibit 24) (emphasis added).

In a letter dated February 27, 1991, Connor responded by reaffirming his January 31 letter (Pet. Appx. at E-16; Rec. 21:417-18; Exhibit 25). On or about March 11, 1991, Reich's job duties were reduced pending his June 30 departure from News and Publication (Pet. Appx. at E-18; Rec. 21: 420-21; Exhibit 26).

On April 2, 1991, Attorney Devitt sent a letter to respondent Connor, but failed to file a notice of claim, alleging that petitioner Reich's rights had been violated (Pet. Appx. at E-21, E-22; Rec. 21:421; Exhibit 27). In a letter dated April 8 Connor again reaffirmed his January 31 letter. (Pet. Appx. at E-24; Rec. 21:422-23; Exhibit 28).

In a May 7, 1991, letter Attorney Devitt again wrote to respondent Connor alleging that Reich was "whistleblower" and that the termination decision was without just cause (Pet. Appx. at E-26 through E-29; Rec.21:424; Exhibit 29).

As of May 31, 1991, 120 days had elapsed since respondent Connor's January 31, 1991, letter to petitioner Reich terminating his employment. Neither Reich nor Attorney Devitt had filed a notice of claim as required by sec. 893.82, Stats. Attorney Devitt had been involved with the case for almost a year (Rec. 21:287, 325, 327; Exhibit 21).

In a letter dated June 18, 1991, respondent Connor notified Reich that he had located a position for him in the Continuing Education Department as an Outreach Program Specialist, and offered it to him if he wanted it:

> I am writing to offer you the position of Outreach Program Specialist, for which you previously applied, effective July 1, 1991. You will be assigned to the Division of Continuing Education and Outreach ....

(Pet. Appx. at E-31, E-32; Rec. 21:424-25, 445; exhibit 30) (emphasis added).

The ninth paragraph of petitioner's statement (Pet. at 5) is unconscionably inaccurate in that it purports to quote respondent Connor as stating that petitioner Reich should "plan to report [to his new job] on July 1, 1991" . Yet neither of the citations to the record, Connor's letter and Reich's second affidavit, contain any such quotation.

Petitioner's ninth paragraph ends with a claim that "newly-appointed Chancellor Gaylon Greenhill ... indicated that Reich could either accept his reassignment or be fired" (Pet. at 5). Chancellor Greenhill, who replaced the retiring respondent Chancellor Connor on July 1, 1991, was never named as a party to this action.

The Outreach Program Specialist was a position similar to one Reich had applied for but not received a year earlier, in 1990 (Rec. 21:444; Exhibit 30). This was

the same position that Reich had earlier expressed an interest in and which Connor had unsuccessfully tried to secure for Reich in December of 1990 (Rec. 21:375). At no time from the point that Connor first tried to get this job for Reich in December of 1990 until the time the job was offered to him in June of 1991, did Reich ever tell Connor that he did not want this job (Rec. 21:461).

Whether or not petitioner Reich ever signed a contract he accepted the position even though it involved a salary of $35,995, as compared to $50,000 in News and Publication (Rec. 21:424-26, 431-32, 471; Exhibits 30 and 31). The $35,995 salary was the top of the pay range for this position and made Reich the highest paid Outreach Specialist in the Continuing Education Department (Id.).

At his deposition petitioner Reich admitted that he was treated well by and got along with his new supervisors, Mrs. Zahn and Dean Thomas McLeRoy, and his new co-workers (Rec. 21:451-452). No one in this job asked him to do anything wrong or morally repugnant (Id.).

Nevertheless, on October 8, 1991, Reich submitted his resignation from the university effective October 31, 1991 (Rec. 21:452-53; Exhibit 34). He did this despite advice from Dean McLeRoy that he should locate a new job before resigning from Continuing Education (Rec. 21:475). Reich's last day of employment with the University of Wisconsin-Whitewater was October 31, 1991 (Rec. 21:Exhibit 34).

Attorney Devitt and petitioner Reich finally filed a notice of claim on September 30, 1991, (Pet. at 6) 242 days after the January 31, 1991, acceptance of his full resignation.

Paragraphs ten and eleven of the petitioner's statement (Pet. at 5-6) are unfairly misleading in that they attempt to pass off argument that an "involuntary and arbitrary transfer" created a "fresh wrong" as fact.

The twelfth and thirteenth paragraphs of the petitioner's statement (Pet. at 6-7), which craft the argument that petitioner "reasonably believed" "state laws or bidding procedures" were violated, even if they weren't, are unfairly misleading because they ignore half the record. Plaintiff's admissions at his depositions as to what he thought and did at the time the historical events were occurring are cited above. Petitioner's affidavits (Pet. Appx. D & E) were created not only after the onset of litigation, but after the respondents filed for summary judgment and laid out their theory of the case.

The sixteenth paragraph of petitioner's statement (Pet. at 8-9) is unfairly misleading because it tries to pass off as "fact" the argument that the state law notice of claim issue is a question of federal constitutional law, while admitting in a footnote (Pet. at 8-9, n. 5) that this was not raised in the state courts below.

SUMMARY OF THE ARGUMENT

This case does not meet the criteria for granting a writ of certiorari. The essence of certiorari review is: 1) resolving conflicts on federal questions of law between the circuits or state courts of last resort; or 2) resolving novel questions of federal law. Neither is present in this case.

The state courts below did not make any new law in the area of qualified immunity. Both followed well-settled pronouncements by this Court and by the Seventh Circuit Court of Appeals, and merely applied that body of law to the facts of this case.

Petitioner's attempt at distorting the facts constitutes an implicit admission that absent same this case does not meet this Court's criteria. The gravamen of retaliation is excessive and punishing conduct following and motivated by speaking out on matters of public concern. The essential considerations are sequence of events and the putative victim's time, place and manner of speaking out. The negative evaluation omitted from petitioner's statement of facts radically shifts the light in which the case is cast. If petitioner's disclosure only came after a negative evaluation, it invites the inference that it was petitioner Reich "retaliating" against respondent Spellman. This thesis is fortified by the facts that: 1) petitioner Reich knew about respondent Spellman's alleged offensive "policy" before the negative evaluation, but made no disclosure until after it; and 2) petitioner made no complaint within the

chain of command before going outside. Whether or not this scenario would be determinative for the retaliation claim on the merits, it certainly made the qualified immunity issue easy for the courts below to decide.

Petitioner's state law claim involves no issue of federal law. The posturing of it as involving a federal question is based upon a gross distortion of the facts not supported by the record. Moreover, the courts below decided the issue consistent with both state law and this Court's prior rulings. And finally, the issue of the constitutionality of the state notice of claim statute was never raised below.

ARGUMENT

I. THIS CASE DOES NOT MEET THE CRITERIA FOR GRANTING A WRIT OF CERTIORARI.

The state court of last resort, the Wisconsin Supreme Court, determined that this case was significant enough to merit discretionary review. The state court of appeals has not decided the one and only federal question, qualified immunity, in a way that conflicts with this Court or the Seventh Circuit Court of Appeals. The law of qualified immunity has already been well settled by this Court, and the decision in this case is consistent with those rulings. The petitioner's argument that the state courts errored, absent more, is not sufficient to merit this Court's review.

II. THE RULINGS OF THE STATE COURTS BELOW GRANTING QUALIFIED IMMUNITY TO THE RESPONDENTS ARE CONSISTENT WITH WELL-SETTLED FEDERAL LAW ON QUALIFIED IMMUNITY.

Government officials performing discretionary functions are shielded from damage liability insofar as their conduct does not violate clearly established statutory or constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The general rule is immunity; the law intends that liability is to be the exception. Rakovich v. Wade, 850 F.2d 1180, 1205-06, 1209-10 (7th Cir. 1988), cert. denied, 109 S. Ct. 497 (1988). It is the plaintiff's burden to prove that an exception exists. Id. at 1209; Davis v. Scherer, 468 U.S. 183, 197 (1984). The plaintiff has the burden of demonstrating the existence of a "clearly established" right. See Mitchell v. Forsyth, 412 U.S. 511, 526 (1985); Anderson v. Creighton, 483 U.S. 635, 640 (1987).

This showing must be made by reference to case law. Rakovich, 850 F.2d at 1209, 1212. The plaintiff must make this showing by overwhelming authority; if reasonable minds could disagree the right could not be said to have been clearly established. Id. at 1207-10, 1214. "[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized." Malley v. Briggs, 475 U.S. 335, 341 (1986).

In addition, it should be emphasized that breaching the defense requires that the right be clearly established in its own particular factual context by

922 F.2d at 383 (citations omitted; emphasis added).

> Government has some interest in inducing employees to think about the consequences of their public speech - social workers ought to preserve confidences and speak dispassionately, even if the first amendment allows them to do otherwise. . . . This interest may justify a measured response even if it is not enough to hurl the offender onto the street.

922 F.2d at 384 (citations omitted; emphasis added; italics in original).

> As the disagreement among the judges . . . shows, questions about the extent to which public employers may take speech into account remain the subject of debate. Immunity lifts from the shoulders of public employees the onus of predicting the outcome of these debates.

922 F.2d at 385 (emphasis added).

In Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983), cert. denied 464 U.S. 918 (1983), the court stated:

> The First Amendment protects the right of a government employee to make good faith accusations of malfeasance in office against fellow workers, but the First Amendment does not guarantee the employee a cost-free exercise of that right.

710 F.2d at 322 (citation omitted; emphasis added).

III. THE PETITIONER'S ARGUMENT CONFUSES THE TEST FOR QUALIFIED IMMUNITY WITH THE TEST FOR RETALIATION ON THE MERITS.

The petitioner's argument largely misses the point. The respondents were granted summary judgment solely on the ground of qualified immunity (on the federal law claim). But the petitioner's argument focusses on the balancing of the employer's interests against those of the employee under Pickering v. Board of Education, 391 U.S. at 563. The respondents could virtually concede retaliation on the merits without necessarily losing qualified immunity.

Note that petitioner essentially only says that the court of appeals reached the wrong result in applying the Pickering or Connick v. Myers, 461 U.S. 138 (1983) factors. He does not argue that the court ignored the test, or created a new one in conflict with established case law. The criteria enunciated in Rule 10 of the rules of this court remain unmet.

IV. A FINDING OF QUALIFIED IMMUNITY IS COMPELLED WHEN APPLYING THE WELL-SETTLED LAW TO THE FACTS OF THIS CASE.

The facts make it at least arguable that petitioner's disclosure, which would necessarily embarrass Spellman because it

indulge every fact presumption necessary to help a statute stand. Wis. Bingo Sup. & Equip. Co. v. Bingo Control Bd., 88 Wis. 2d 293, 301, 276 N.W.2d 716 (1979); Racine Steel Castings v. Hardy, 144 Wis. 2d 553, 560, 426 N.W.2d 33 (1988).

The burden of proof and presumption change only if a statute impinges on a suspect classification or a fundamental right. See Clark v. Jeter, 486 U.S. 456, 461 (1988). No suspect classification or fundamental right is involved in this case.

The granting of limited immunities to certain classes of defendants does not constitute a suspect classification or violate a fundamental right. The Wisconsin Supreme Court has expressly rejected the notion that classifications among different groups of tortfeasors should be subjected to strict scrutiny. State ex rel. Strykowski v. Wilke, 81 Wis. 2d 491, 507, 261 N.W.2d 434, 442 (1978). See also Duke Power Co. v. Carolina Environ. Study, 438 U.S. 59, 83 (1978).

The only other factor that can affect a rigid application of the time limits is procedural due process. In Ocampo v. Racine, 28 Wis. 2d 506, 137 N.W.2d 477 (1965), the court determined that procedural due process was not violated. This notice requirement has been upheld against serious constitutional challenge in all other respects. See Mannino v. Davenport, 99 Wis. 2d 602, 614-15; 299 N.W. 2d 823 (1981); Yotvat v. Roth, 95 Wis. 2d 356, 362-69, 290 N.W.2d 524 (Ct. App. 1980).

CONCLUSION

Based upon the foregoing arguments the respondents respectfully move this Court to deny the writ of certiorari and to dismiss the petition.

Respectfully submitted,

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was secret and without warning, was itself an act of retaliation by the petitioner. This in turn casts Spellman's and Connor's acts in an entirely different light. In the course of balancing rights and equities the respondents were entitled to the "widest net" cast by qualified immunity, and it cannot be said that the holdings below deviated from the federal law of qualified immunity. More importantly, the decisions below did not purport to set up a new test for immunity or create any conflicts of law.

V. THE PETITIONER IMPROPERLY REPRESENTS THE STATE LAW NOTICE OF CLAIM ISSUE AS INVOLVING A QUESTION OF FEDERAL LAW.

A. The Petitioner Failed To Comply With The Wisconsin Notice Of Claim Statute.

Section 893.82(3), Wis. Stats., provides in part:

> Except as provided in sub (5m)[medical malpractice], no civil action or civil proceeding may be brought against any state officer, employee or agent. . . unless within 120 days of the event causing the injury . . . the claimant in the action or proceeding serves upon the attorney general written notice of a claim . . . .

Compliance with the notice statute is a condition precedent to a suit against a state employee; it is jurisdictional in nature and, therefore, is not waived by failing to raise it as an affirmative defense. Ibrahim v. Samore, 118 Wis. 2d 720, 726, 348 N.W.2d 554 (1984).

The duty of compliance is strictly construed against the plaintiff and is liberally construed in favor of the defense; sec. 893.82(2m) provides:

> No claimant may bring an action against a state officer, employee or agent unless the claimant complies strictly with the requirements of this section.

In Kashishian v. Port, 167 Wis. 2d 24, 51-52, 481 N.W.2d 277 (1992), suit was barred for failure to timely file the notice of claim even if the date an Assistant Attorney General had actual notice also marked the beginning of the notice period. Substantial compliance is insufficient to meet the terms of the statute. Kelly v. Reyes, 168 Wis. 2d 743, 747, 484 N.W.2d 388 (Ct. App. 1992). It is irrelevant that the state has not been prejudiced. Carlson v. Pepin County, 167 Wis. 2d 345, 357, 481 N.W.2d 498 (Ct. App. 1992). In 519 Corp. v. DOT, 92 Wis. 2d 276, 284 N.W.2d 643 (1979), the court said:

> Uniformity, consistency, and compliance with procedural rules are important aspects of the administration of justice. If the statutory prescriptions to obtain jurisdiction are to be